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THE INTERPRETATION OF THE ANGLO- AMERICAN CONVENTION ON PALESTINE,

1924

THE termination of the British Mandate for Palestine on May 15, 1948, brought to an end the operation of the Convention between the United Kingdom and the United States of America signed in London on December 3, 1924, and ratified on December 3, 1925. The aim of the Convention was to define the rights of the Governments of the two countries and their respective nationals in Palestine. Since it is no longer in force, there is no practical significance in dealing with this Convention and in establishing its juridical purport. From the theoretical point of view, however, it may be worth while inquiring into the interpretations which were given to the Convention during the twenty-four years of its operation. Such inquiry may lead to more general conclusions with regard to the technique of drafting international instruments and the value of interpretations which, though differing from the original intention, may be subsequently agreed upon by the parties.

I

The Preamble to the Convention contains the full text of the Palestine Mandate including the latter's Preamble.

Article 1 reads as follows: 'Subject to the provisions of the present Convention the United States consents to the administration of Palestine by His Britannic Majesty, pursuant to the mandate'.

Under Article 2, 'the United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of the Mandate to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations'.

Articles 3, 5 and 6 provide that 'vested American property rights in the mandated territory shall be respected and in no way impaired'; that 'the nationals of the United States will be permitted freely to establish and maintain educational, philanthropic and religious institutions in the mandated territory'; and that 'the extradition treaties and conventions which are, or may be, in force between the United States and Great Britain . . . shall apply to the mandated territory'.

Article 4 requires Great Britain to furnish to the United States 'a duplicate of the Annual Report to be made by the Mandatory under Article 24 of the Mandate' to the League of Nations.

Finally, according to Article 7, 'nothing contained in the present Convention shall be affected by any modification which may be made in the terms of the Mandate, . . . unless such modification shall have been assented to by the United States'.

II

On the occasion of the submission, in June, 1937, of the Report of the Royal Commission of Inquiry on Palestine to the British Government, the latter was requested by the United States Government for 'a detailed elucidation of the official British position, having regard to the terms of the American-British Convention . . . on the question of consulting the United States Government with respect to any changes that may be proposed in Palestine'.¹

This the British Government did in its Note, dated July 7, 1937, the relevant passage of which reads as follows: 'The rights of the United States Government and their nationals as regards Palestine are those recited in Articles 2 to 6 of the Convention, and in Article 7 of the Convention. These rights must remain intact whatever changes may be made in the Mandate for Palestine, unless the United States assent to such a change. . . . In the view of His Majesty's Government, however, these rights are limited to those specified in the Articles of the Convention referred to above, and the consent of the United States Government will therefore not be required to any change in the Palestine Mandate unless the specific rights in question are thereby affected. Indeed, the United States having assented, by Article 1 of the Convention, to the Mandate as a whole, it follows that the United States Government have accepted the provision in Article 27 of the Mandate which lays down that the Mandate may be altered with the consent of the Council of the League of Nations'. The Note ends: 'While the foregoing represents the view of His Majesty's Government as to their legal

¹ Cmd. 5544 (1937), p. 2.

obligations towards the United States Government in the matter, they fully appreciate . . . the interest taken by the United States Government in the question of the solution of the Palestine problem and it is their intention to keep the United States Government fully informed of any proposals which they may put forward to the Council of the League of Nations for the modification of the Mandate'.²

In a further Note, dated August 4, 1937, the United States Government did not contest the restrictive construction placed on the Convention by the British Government and made no reservation with regard to it, so that the United States must be taken to have accepted it. As, however, the Report of the Royal Commission, which was published in the meantime, proposed the termination of the Palestine Mandate and its replacement by a treaty system, the United States Government thought it best to revert to the principles advanced on a previous occasion, when it stated in a Note following the termination of the special relations between the United Kingdom and Iraq: 'Since the termination of a régime in a mandated territory necessarily involves the "disposition" of the territory and affects the interests of American nationals therein, the right of the United States to be consulted with respect to the conditions under which the territory is subsequently to be administered is on precisely the same basis as its right to be consulted with regard to the establishment of a mandatory régime. . . . The approval of the United States is essential to the validity of any determination which may be reached regarding mandated territories'.³

The United States Government now stressed that as in the case of Iraq 'its position . . . is based exclusively on its obligation to provide for the *protection of American interests*'⁴ in Palestine on a basis of equality with those of other Governments and their nationals'.⁵ The British Government was, therefore, requested to submit to the United States proposals which may be made for the modification of the Palestine Mandate 'in ample time to enable it to determine what, if any, observations it may desire to make with a view to the preservation of American rights in Palestine'.⁶

² *Ibid.*, p. 3.

³ *Ibid.*, p. 4.

⁴ Author's italics.

⁵ It may be noted that the reference to American interests in the case of Iraq is no precedent in respect of Palestine. With regard to Iraq the United States Government signed, in January, 1930, a Convention with Great Britain and Iraq and in which it agreed that the 'special relations' between the United Kingdom and Iraq may be terminated without their consent (Article 7). But in 1932, when the independence of Iraq was about to be materialised, the United States Government claimed to be consulted with respect to the conditions under which Iraq was to be administered upon the cessation of the Mandatory relationship. In the circumstances the United States could hardly make far-reaching demands, and so confined its intervention to the protection of American interests.

⁶ Cmd. 5544 (1937), p. 4.

III

The interpretation of the Convention, summarised above, indicates a clear intention to restrict the scope of its application. According to this interpretation, the assent of the United States Government would be required only in respect of such modifications of the Mandate as might affect American rights or interests in Palestine, and, so far as these rights or interests are not affected, the United States Government would have no title to intervene. Thus, it would not be allowed to intervene if—to take only one example—the Mandatory violated any provision of the Mandate relating to the establishment of the Jewish National Home, or sought to alter such provision or deprive it of effect.

The restrictive interpretation of the Convention was maintained in various statements made later by the United States Government, in 1938 and 1939, when American public opinion, moved against the attempts of the British Government to appease the Arabs at the expense of the Jews, pressed for intervention. In his letter dated October 19, 1938, to Mayor Thomas J. Spellacy of Hartford, President Roosevelt, while stressing his sympathy with the establishment of a National Home for the Jews, stated: 'I understand, however, that under the terms of our Convention with Great Britain regarding the Palestine Mandate, we are unable to prevent modifications in the Mandate. The most we can do is to decline to accept as applicable to American interests any modifications affecting such interests unless we have given our assent to them. You may be sure that we shall continue to follow the situation with the closest attention'.⁷

A year later, after the British Government had published the White Paper of 1939, inaugurating a new policy which was clearly inconsistent with the Palestine Mandate and was calculated to arrest the development of the Jewish National Home, the State Department issued a statement in the same restrictive sense. Recalling the formal exchange of correspondence which took place in 1937 on the occasion of the Royal Commission's Report, the statement explicitly referred to the Note of August 4, 1937, and went on: 'It is expected, therefore, that this Government will have an opportunity to submit its views to the British Government with respect to any changes affecting American rights which may be proposed in the Palestine Mandate. These rights, which are defined by the American-British Mandate Convention . . . comprise non-discriminatory treatment in matters of commerce, non-impairment of vested

⁷ *America and Palestine, The Attitude of Official America and of the American People toward the rebuilding of Palestine as a free and democratic Jewish Commonwealth*, Prepared and Edited by Reuben Fink, New York, 1944, p. 56.

American property rights, permission of American nationals to establish and maintain educational, philanthropic and religious institutions in Palestine, safeguards with respect to the judiciary, and, in general, equality of treatment with all other foreign nationals'. The statement then referred to Article 7 of the Convention (relating to changes in the terms of the Palestine Mandate) which is substantially identical with the corresponding Articles in the other Conventions with respect to Mandated territories, and concluded: 'None of these articles empower the Government of the United States to prevent the modification of the terms of any of the mandates. Under their provisions, however, this Government can decline to recognise the validity of the application to American interests of any modification of the mandates unless such modification has been assented to by the Government of the United States'.⁸

In November, 1943, the United States Assistant Secretary of State, Mr. Breckenridge Long, adopted a similar attitude when, appearing before the Committee on Foreign Affairs, he declared: 'Of course you realise that Palestine is operated under a mandate of the League of Nations granted to the British Government and that we were not parties to the authority which created the mandate. We made a treaty subsequently with Great Britain so as to give us a right under the mandate to protect the rights of American citizens in Palestine'.⁹

IV

As we have seen, the United States Government accepted the interpretation of the Convention advanced by the British Government and, by virtue of the principle *eius est interpretari cuius est condere*, this interpretation would appear to have become authoritative.

It may be observed that this interpretation differed from the one generally accepted and sometimes even officially advanced. Thus, Lord Snell, speaking in the House of Lords, in July, 1937, on the partition plan of the Palestine Royal Commission, referred to the 'treaty rights' of the United States in this matter and added: 'I wonder if they [the United States] have consented to the vivisection of Palestine'.¹⁰ In the course of the discussion which took place in the same month in the Permanent Mandates Commission, the Dutch member, van Asbeck, asked the British representative, Mr. Ormsby Gore, what would happen if, after the matter has passed through all the stages of League procedure, America exercises a veto.¹¹ Mr.

⁸ *Ibid.*, pp. 74-75.

⁹ *Hearings before the Committee on Foreign Affairs, House of Representatives, 78th Congress, House Resolutions 350 and 352, Washington, 1943, p. 38.*

¹⁰ *Parliamentary Debates, House of Lords, Vol. 106, No. 94, p. 600.*

¹¹ *League of Nations, Permanent Mandates Commission, Minutes of the Thirty-Second (Extraordinary) Session, Geneva, 1937, p. 40.*

Ormsby Gore did not make a definite reply, but did not contest the premise that no change of the Mandate could be made without the consent of the United States.

Even after the British interpretation was accepted by the United States Government, many political leaders—particularly in the United States—continued to interpret the Convention as obliging Great Britain to obtain the assent of the United States to any modification of the Mandate. After the publication of the White Paper of 1939, fifteen members of the Committee on Foreign Affairs of the House of Representatives urged the State Department to protest and termed the White Paper 'a clear repudiation' and 'a violation' of the Anglo-American Convention. They maintained that the Convention 'contains as a part thereof the Balfour Declaration and the League of Nations Mandate' and that according to Article 7 the American consent was necessary to any change in the Mandate.¹² Moreover, many of the Congressmen who appeared in 1944 before the Committee on Foreign Affairs on the two resolutions on Palestine introduced in both Houses of the American Congress, took the same attitude.¹³ In the Senate, too, speeches were made to the same effect. To give but one example,¹⁴ Senator C. Edwin, speaking on March 28, 1944, said: 'The Convention specifically states in article 7 that no modification shall be made in the terms of the mandate unless such modification has been assented to by the United States'.¹⁵

It will be seen that the interpretation officially placed on the Convention in 1937 continued to be challenged,¹⁶ and it would seem therefore to be worth while examining whether the interpretation mutually agreed by the two Governments was not in contradiction to the wording of the Convention and inconsistent with the *travaux préparatoires*.

V

As already pointed out, the British Government relied for the restrictive interpretation of the Convention on Articles 1 and 7 of the Convention itself, and on Article 27 of the Palestine Mandate. As the United States Government consented to the administration

¹² Reuben Fink, *op. cit.*, p. 63.

¹³ See *The Jewish National Home in Palestine, Hearings before the Committee on Foreign Affairs, House of Representatives*, Washington, 1944, pp. 12, 17 and 156. As to the attitude of the Chairman of the Committee, see *ibid.*, pp. 254-255 and 503.

¹⁴ See Reuben Fink, *op. cit.*, pp. 111, 150, 162 and 180.

¹⁵ *Ibid.*, p. 124.

¹⁶ On March 9, 1944, President Roosevelt authorised a Zionist Delegation to say 'that the American Government has never given its approval to the White Paper of 1939' (Fink, *op. cit.*, p. 57). This statement may perhaps be regarded as a departure from the previous attitude, since it seems to imply the necessity for the approval of the United States.

of Palestine 'pursuant to the mandate' and as under Article 27 the Mandate could be modified with the consent of the Council of the League of Nations, the United States must be taken to have agreed to changes being made in the Mandate without its approval. The only reservation was contained in Article 7 of the Convention under which the assent of the United States was required for such changes as affected the provisions of Articles 2-6 of the Convention.

This argument may be attractive at first sight, but its weakness appears on a more thorough examination of the text of the Convention. The British contention seems to overlook the explicit provision in Article 2 that not only American *nationals* but also the *United States* shall 'enjoy all the rights and benefits secured under the terms of the mandate to members of the League of Nations'. The use of the expression 'United States' besides 'nationals' indicates that the object was to ensure equality not only between American nationals and nationals of all States members of the League, but also between the United States as a State and all States members of the League.

Now, under Article 27 of the Palestine Mandate, and the corresponding Articles in other Mandates, the consent of any member of the League of Nations with a seat on the Council, whether permanent or non-permanent, was required for any change in the Mandate. At the same time, Article 4 of the Covenant of the League entitled the United States, as one of the Principal Allied and Associated Powers, to a permanent seat on the Council. The conclusion would therefore seem to be unavoidable that the United States, enjoying the same 'rights and benefits' as any other permanent member of the Council, had the right to object to any modification of the Mandate without its approval.

It may be added that the Preamble of the Convention also affirms that the desire of the contracting parties is 'to reach a definite understanding with respect to the rights of the two *Governments*¹⁷ and their respective nationals . . .' (recital 7). Here, the Government of the United States is explicitly referred to, and not, as in Article 2, the United States in general.

As is well known, United States claims in respect of Mandated territories were mainly, if not exclusively, based on the persistent demand for complete equality with all States members of the League, notwithstanding the fact that the United States was not a member of the League. Thus, the United States Government objected that the report, which every Mandatory had annually to submit to the League and which was also to be submitted to itself, should be called a 'copy'. It insisted that it should be described

¹⁷ Author's italics.

as a 'duplicate', so that 'the Government of the United States . . . should be placed in a position not inferior to that of the other Principal Allied and Associated Powers which . . . are to receive an annual report'.¹⁸ This explicit claim of the United States Government to equal status with the Principal Allied and Associated Powers inevitably involves the right of the United States to prevent any change in the Mandate without its assent.

VI

The British argument relied also on Article 7 of the Convention, which appears textually in all the nine Conventions concluded by the United States with regard to Mandated territories. Admittedly this Article is not too clear and is open to different interpretations. The question is whether the words of the Article 'nothing contained in the . . . convention' referred only to the Articles of the Convention, or also to the Articles of the Mandate which were quoted fully in the Preamble to the Convention and mentioned in Article 1, so that they may be considered to be embodied in the Convention.

With regard to the Mandate for Palestine—and also that for Syria and the Lebanon—the ambiguity in this respect is less marked than with regard to the other Mandates. The other seven Conventions specify the Articles of the Mandate in respect of which the United States shall receive all the benefits. The Article dealing with the change of the Mandate is not among them. On the other hand, the two Conventions concerning Palestine and Syria and the Lebanon provide for 'all the rights and benefits . . . secured under the terms of the mandate'. Article 7 of the Convention cannot be interpreted so as to reduce the extent of the rights explicitly given to the United States under Article 2 of the Convention.

This may be corroborated by the 'preparatory work' of the Convention. In its Note to the British Foreign Office of August 24, 1921, the United States Government claimed 'that the consent of the United States shall be necessary to any modification of the mandate after it has been agreed upon'.¹⁹ The British Government

¹⁸ *Foreign Relations*, 1921, Vol. 2, p. 303. See also *Department of State, Mandate for Palestine*, Prepared in the Division on Near Eastern Affairs, Washington, 1927, p. 64.

¹⁹ *Ibid.*, p. 52. In this claim the United States Government affirmed the stand it had previously taken in the negotiations with Japan for the conclusion of the Convention with regard to the former German Islands in the Pacific Ocean north of the Equator, and in particular the island of Yap. This was the first Convention concerning a Mandated territory, and, on that occasion, the United States Government wrote on September 15, 1921: 'It is understood that the administration by Japan of the Mandated islands will be subject to the Convention with the United States, and that the terms of the Mandate which are recited in the Convention and of which the United States is to have the benefit will not be modified without the express consent of the United States' (*Foreign Relations*, 1921, Vol. 2, p. 297).

replied that as 'already explained in the case of the African mandates . . . they find it difficult to provide in the article of the mandates, which deals with these questions, for reference to any States, other than those of the League of Nations, whether by name or by collective definition',²⁰ but 'there is nothing to prevent the Mandatory giving a separate undertaking to this effect'.²¹ The United States Government accepted the suggestion and in its Note of April 5, 1922, agreed that 'such an undertaking may be embodied in the proposed treaty'.²²

These quotations indicate that it was merely on account of technical reasons that the provision relating to the assent of the United States to changes in the Mandate was inserted, not in the Mandate itself, but in the Convention, and that the intention of the parties was to prevent *any* modification without such assent. Just as the United States claimed the unqualified right to take part in the drafting of the Mandates, so it claimed that its voice should be heard in the future in respect of any changes in the Mandates.

It may be that during the discussion on the text of the Mandates and of the Conventions, stress was often laid on American interests, and especially on equality of treatment and opportunity for American commerce,²³ so that the inference may have been drawn that the only purpose was to protect these interests. But the above analysis of the texts of the correspondence seems to dispose of that inference.²⁴

It may be argued that, if our interpretation of Article 2 is correct, Article 7 is superfluous. For, if Article 2 prohibited *any* change in the Mandate without the consent of the United States, then it must have prohibited also any change affecting the provisions of the Convention. However, the draftsmen of the Convention may not have noticed the duplication, or may not have regarded it as objectionable to state explicitly what was already implied in another Article of the Convention or the Mandate. For instance, the

²⁰ *Ibid.*, p. 55.

²¹ *Ibid.*, p. 64.

²² *Ibid.*

²³ *Department of State, Mandate for Palestine*, pp. 50 and 61.

²⁴ 'The fact that some of the inner circles of the Department saw in this Convention nothing but a guarantee of purely American interests does not, however, justify the assumption that it was devoid of Zionist overtones in its general spirit. In the only two formal communications to the President in which this Convention is mentioned the State Department both times highlighted the inclusion of the "Jewish homeland" principle in the text. When these communications to the President are read together with the Joint Congressional Resolution of 1922, the conclusion is inescapable that the President, the Senate and the people understood in the signing of this Convention some degree of American participation in responsibility for the goal of the Mandate as set forth in the Balfour Declaration. . . . At the same time full United States responsibility was not clearly undertaken' (Frank E. Manuel, *The Realities of American-Palestine Relations*, Washington, 1949, p. 289).

provision embodied in Article 6 of the Convention that 'the extradition treaties and conventions which are, or may be, in force between the United States and Great Britain . . . shall apply to the mandated territory' is an almost textual repetition of the provision in Article 10 of the Mandate which provided that 'pending the making of special extradition agreements relating to Palestine, the extradition treaties in force between the Mandatory and other Foreign Powers shall apply to Palestine'. Moreover, the desire to have a uniform text for the Conventions no doubt had its part in the above duplication. It was deemed by the State Department to 'be advisable that in so far as it is practicable the Convention for Palestine should follow closely the form of other similar conventions respecting Mandates'.²⁵ As the Palestine Convention was the sixth in date, the Article in question was copied in the form in which it appeared in the earlier Conventions.²⁶

In interpreting the Anglo-American Convention it may be useful to refer to the correspondence between the two States with regard to Trans-Jordan, for, being contemporary, it should reveal the intention of the parties at the time of signature of the Convention.

As is known, the Council of the League of Nations decided, in September, 1922, in compliance with the terms of Article 25 of the Palestine Mandate, that the provisions of the Mandate relating to the establishment of the Jewish National Home should not apply to the territory known as Trans-Jordan. In a Note of April 30, 1924, the United States Secretary of State summed up the position of his Government in the following terms: 'Upon the conclusion of the convention between the United States and Great Britain . . . it is my Government's understanding that the convention will be applicable to such territory as may be under British mandate to the east, as well as to west of the River Jordan, and that, in view of the provisions of Article 7 as proposed, no further change will be made with respect to conditions of the British administration of the territory known as Trans-Jordan without the previous assent of my Government. I am instructed to inquire whether the British Government is in accord with this view'.²⁷

In its reply, dated July 17, 1924, the British Government did not challenge the right claimed by the United States, but remarked

²⁵ Department of State, *Mandate for Palestine*, p. 74.

²⁶ In his above-quoted work, Manuel seems to overlook this tendency towards uniformity when he says that the drafting of Article 7 was a 'sudden shift'. In his view this 'can only be explained by the accentuation of State Department isolationism with respect to Palestine, a reaction against the involvements inherent in the Congressional Resolution on Palestine which had been adopted, in somewhat variant versions, by the Senate on June 3 and the House on June 30' (Manuel, *op. cit.*, pp. 279-280).

²⁷ Department of State, *Mandate for Palestine*, p. 88.

that it was essential that the Mandatory 'be allowed latitude to make changes in the administration of that territory [Trans-Jordan] as may appear necessary, provided that such action does not conflict with the terms of the Mandate'.²⁸ The United States Government then made it clear that the intention was not to prevent minor changes in the Mandatory administration of Trans-Jordan but 'general changes', and in connection with any of them it required an assurance that the British Government would consult it as well as the Powers represented on the Council of the League.²⁹ On November 10, 1924, *i.e.*, three weeks before the signature of the Convention, Great Britain gave this assurance.³⁰

Throughout this correspondence relating to Trans-Jordan it was never mentioned that the American claim was qualified and limited to American interest.

VIII

We have tried to elucidate in this article the meaning of the Anglo-American Convention, 1924. We have seen that its Articles are wanting in exactness and precision, and difficulties have therefore arisen determining its legal interpretation.

The first conclusion to be drawn from this Convention, as well as from scores of other Conventions, is that Governments and draftsmen should pay much more attention to the technique of drafting international instruments and should avoid formulating them in a 'vague, indefinite and equivocal way'.³¹

True, with regard to the Anglo-American Convention the question did not give rise to any conflict. As soon as the question of its application arose, the two Governments informally agreed on its interpretation. Generally there is no objection if two or more States, parties to an international instrument, agree, by way of interpretation, to change its previous meaning. Mutual agreement is better than any dispute. But it is questionable whether this applies also to cases such as the present.

When the Convention was made the intention was to grant to the United States Government the right of preventing any change in the Mandate except with the consent of that Government, and so the latter was entitled, *inter alia*, to give protection, if necessary, to the Jewish National Home. The Convention was thus reasonably regarded, and not by Jews alone, as a further international guarantee for the fulfilment of the Mandate.³² The limitation of the

²⁸ *Ibid.*, p. 91.

²⁹ *Ibid.*, p. 93.

³⁰ *Ibid.*, p. 94.

³¹ Hans Kelsen, *Legal Technique in International Law, A Textual Critique of the League Covenant*, Geneva Studies, Vol. 10, No. 6, Geneva, 1939, p. 10.

³² It may be of interest to mention that when the negotiations for the Convention were conducted, the British Government insisted 'that the Convention should contain a specific allusion to the policy of establishing a national home

Convention to the protection of American interests undoubtedly prejudiced the cause of the Jews, for by waiving its right to intervene in favour of the National Home, the United States gave Great Britain a free hand in Palestine. It may be seriously questioned whether it is for the benefit of the international relations and the sanctity of treaties that, under the cloak of interpretation, radical changes should be allowed to be introduced in international instruments, with the result that the beneficiaries of such instruments might be deprived of what they had legitimately considered to be their right.

The restrictive interpretation of the Anglo-American Convention prevented the United States from making any legal intervention, based on an international instrument, but did not exclude a political representation of a friendly character. Indeed, in his statement before the Committee on Foreign Affairs which has been mentioned above, Mr. Breckenridge Long stressed the interest displayed by the United States in the Jewish fate and Zionist cause, and added: 'We have been interested and we will continue to be interested from the point of view of the larger aspect of world security and of world peace, as well as the rights of human and humanitarian sympathies and the religious sentiments involved'.³³ But the Convention as originally conceived would surely have given the United States the legal right of formal intervention which, generally, carries more weight and has greater effect than any kind of political intervention.

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for the Jewish people in Palestine, having regard to the interest taken in this policy in the United States and the warm support which it has received in that country, of which the recent resolutions of both houses of the Congress have afforded striking evidence' (*State Department, Mandate for Palestine*, p. 81). In consequence, the United States Government agreed that the Preamble to the Convention should include not only the operative part of the Mandate, but also its Preamble which, in turn, included the text of the Balfour Declaration.

Another indication that the interests of the United States were not intended to be restricted to the protection of the rights of United States nationals, but extended also to furthering the establishment of the Jewish National Home, is to be found in the correspondence relating to Article 11 of the Palestine Mandate. In view of the 'special situation' and the 'peculiar conditions existing in Palestine', the United States Government agreed not to insist on the inclusion in the Palestine Mandate of a provision against the granting of monopolistic concessions, as it had claimed in connection with all other Mandates. The United States accepted Article 11 which expressly provided that the administration 'may arrange with the Jewish agency . . . to develop any of the natural resources of the country in so far as these matters are not directly undertaken by the administration'. The reason for the United States' attitude was 'that, in order that the policy of establishing in Palestine a national home for the Jewish people should be successfully carried out, it is impracticable to guarantee that equal facilities for developing the natural resources of the country should be granted to persons or bodies who may be actuated by other motives' (*ibid.*, pp. 56-57). See also *ibid.*, pp. 59-60, 62-63.

³³ *Hearings before the Committee on Foreign Affairs, House of Representatives*, Washington, 1943, p. 38.

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AUSTRIAN DECISIONS ON PRIVATE INTERNATIONAL LAW, 1945-1950¹

AUSTRIAN rules on private international law were considerably changed by events since 1938. During their occupation of Austria the Germans had introduced their own rules of conflict of laws in matters of status and matrimonial law. As these rules covered a wider field and were altogether better suited to modern requirements than the Austrian rules before 1938, the Austrian Act of October 3, 1945, StGBL.No.188/1945² maintained them in force with some slight modifications. As there is an abundance of decisions on international private law since 1945,³ I have to limit myself to a summary survey. Numerous as the cases are, they do not cover the whole field of the conflict of laws. The present article, therefore, cannot claim to give a complete picture of the present state of Austrian private international law.

I. LAW OF PERSONS AND FAMILY LAW

(1) *Illegitimacy.*

Since 1941 suits concerning the rights of an illegitimate child are governed by the national law of its mother at the time of its birth.⁴ In spite of this provision, the Supreme Court⁵ had refused

¹ The views expressed in this article are merely the personal opinions of the author.

² Law Gazettes quoted in this article are *Staatsgesetzblatt (State Gazette)*, abbrev.: StGBL, which appeared from April 27 to November 11, 1945; *Bundesgesetzblatt (Federal Gazette)*, abbrev.: BGBl, which appears since December 23, 1945. The German laws maintained in force were published in the *Deutsches Reichsgesetzblatt (German State Gazette)*, abbrev.: DRGBl.

³ The great number of such decisions is due to the fact that in 1945 more than 10 per cent. of Austria's population consisted of foreign or Stateless refugees.

⁴ § 12 of the 4th Enabling Ordinance to the Marriage Act of October 25, 1941, DRGBl I, p. 654 (abbrev.: 4.DVO).

⁵ The Austrian courts whose decisions are quoted in this article are the following:—

Bezirksgerichte (BG)=District Courts.

Landesgerichte (LG) or Kreisgerichte (KG)=Appellate Courts.

Oberlandesgerichte (OLG)=Higher Appellate Courts.

Oberster Gerichtshof (OGH)=Supreme Court.

Verwaltungsgerichtshof (VwGH)=High Court for the Control of the Administration.

Rueckstellungsoberkommission (ROK)=Intermediate Restitution Commission.

Oberste Rueckstellungskommission (ORK)=Supreme Restitution Commission.

Decisions of these courts are reported in two law journals, in the *Juristische Blätter (JBl)* and in the *Oesterreichische Juristen-Zeitung (OJZ)*. The Reports of the OJZ are quoted by their current numbers. As a rule only cases which are no longer open to review are reported. Reports of cases still under appeal are marked by an asterisk (*).

to apply Italian law to a paternity suit, which a child born in 1933 of a South Tyrolese mother (hence of Italian nationality) brought against a South Tyrolese defendant. The Higher Appellate Court had rejected the Italian law, which admits such suits only in cases of rape, as contrary to Austrian public policy.⁶ The Supreme Court approved this decision by another reasoning. At the time of the birth of the child, the mother was without any doubt an Italian subject. In 1939, however, the defendant as well as the mother and the child emigrated to Austria and thereby lost their Italian nationality. In virtue of a decision of the Austrian Provisional Government of August 29, 1945,⁷ such persons were put on the same footing as Austrian citizens. At the moment the suit was brought, both parties were, therefore, to be treated like Austrian citizens. As a consequence, the case had to come under Austrian law. The above-mentioned rule, whereby paternity suits are governed by the national law of the mother at the time of the birth of the child, applies only if one of the parties is a foreigner. There can be no conflict of laws between Austrian citizens (or persons treated as such) which is based on a difference of nationality. The fact that a person, previous to his naturalisation, was of another nationality can cause him no prejudice, once he has become an Austrian citizen (or is treated as such).⁸

The suit of a German illegitimate child for the establishment of its racial descent was rejected as being contrary to Austrian public policy.⁹ For the same reason the Vienna Appellate Court refused to apply § 1717 of the German Civil Code (BGB), which excludes an illegitimate child from filing a paternity suit, if his mother had had sexual intercourse with more than one man at the time of its conception.^{10, 11} The Supreme Court, however, took the opposite attitude.¹² The provision of § 18 of the 4.DVO¹³ concerning public policy says that 'foreign law shall not be applied,

⁶ In virtue of § 18 of the same Ordinance.

⁷ *Amtsblatt der Justizverwaltung* (Official Gazette of the Federal Ministry of Justice), 1946, p. 7. They were thus assimilated to Austrian citizens (OLG Graz April 8, 1946, OJZ No. 357/1946), but did not actually thereby become Austrian citizens (VwGH June 9, 1948, JBl 1948, p. 462, note 13, cf. also OGH Jan. 19, 1949, OJZ No. 197/1949, quoted *infra*, note 67). The above-mentioned decision was repealed in virtue of another Cabinet decision of May 10, 1949, which will, however, become fully effective only on December 31, 1950.

⁸ OGH Nov. 16, 1948, JBl 1947, p. 61.

⁹ OLG Graz Feb. 6, 1946, JBl 1946, p. 144. This suit was brought after a paternity suit against the same defendant had failed. Strange as this may seem, this was possible under German law before 1945.

¹⁰ LG Vienna August 31, 1946, OJZ No. 547/1946=JBl 1947, p. 84.

¹¹ Under Austrian law, the illegitimate child may choose in such a case whom of the lovers of its mother it will sue (§ 163 of the Austrian General Civil Code (ABGB)).

¹² OGH Sept. 21, 1946, JBl 1947, p. 110.

¹³ Cf. note 4.

if it shocks Austrian moral concepts or if it is contrary to the purposes of an Austrian law'. Now the provision of § 1717 BGB is evidently not immoral. It therefore could only be objectionable as being 'contrary to the purposes of an Austrian law'. The Supreme Court has defined these words as meaning 'contrary to an Austrian law which purports to afford a particular protection to Austrian citizens or Austrian interest'. As § 1717 BGB is more favourable to the Austrian defendant than the Austrian law, it cannot be said that it is contrary to the purpose of an Austrian law as defined above.

(2) *Legitimation.*

If an illegitimate child claims to have been legitimated by an act of its foreign father and to have acquired thereby his foreign citizenship, the authorities of the father's country decide on the validity of such claims.¹⁴

Austrian courts have jurisdiction in suits brought by a foreign husband to dispute the legitimacy of a child born by his wife. The provisions of § 76 of the Jurisdiction Law ('Jurisdiktionsnorm (JN)')¹⁵ which limit the jurisdiction of the Austrian courts in divorce cases between foreigners, do not, by analogy, apply to other parts of the family law.¹⁶

(3) *Guardianship.*

An Austrian court may appoint a guardian for a foreign or stateless minor domiciled in Austria.¹⁷ Such guardianship is governed by Austrian law. As under this law a person attains majority with the completion of his twenty-first year of age (§ 21 ABGB), the application of a twenty-three year old Hungarian to be granted majority before the statutory time provided under Hungarian law (which demands completion of the twenty-fourth year of age) was refused.¹⁸

(4) *Marriage.*

(a) Marriage Capacity Certificates.

Foreigners intending to marry in Austria have to present certificates of the authorities of their country of origin attesting that there exists no impediment against their marriage.¹⁹ The Austrian

¹⁴ LG Vienna Oct. 18, 1947, OJZ No. 729/1947.

¹⁵ Cf. *infra*, notes 39, 40.

¹⁶ OLG Vienna Jan. 28, 1948, OJZ No. 196/1948.

¹⁷ LG Vienna Feb. 22, 1946, OJZ No. 100/1946.

¹⁸ LG Salzburg May 27, 1946, OJZ No. 336/1946.

¹⁹ § 14 of the Marriage Law of July 6, 1938, DRGBl I, p. 807.

registrars may exempt stateless persons and foreigners whose countries do not deliver such certificates, from this obligation.²⁰ The High Court for the Control of the Administration has upheld the decision of a registrar, refusing an exemption to a woman (a *Volksdeutsche* of Czechoslovakia) who wanted to marry a seventy-two year old Austrian. The court held that in this case the public interest not to naturalise stateless persons was more important than the interest of the persons concerned to conclude a marriage, which evidently had no other aim than the naturalisation of the bride.²¹

(b) Forms of Marriage.

Marriages concluded between April 10, 1945, and August 1, 1947, before Officers of the Occupying Forces, which are valid under the law of the Occupying Power concerned, are equally valid under Austrian law.²²

Marriage by proxy is not admitted.²³ However, the presence of the two spouses is not absolutely necessary for the validity of a marriage. If an Austrian living abroad could return to Austria only with considerable difficulty due to post-war conditions, he may declare his intention to conclude a marriage before the Austrian diplomatic representative in his country of residence, whereas the other spouse makes a similar declaration before an Austrian registrar.²⁴

If a person, while validly married, goes through a form of marriage abroad, in compliance with the forms required by the law of the country concerned, he is guilty of bigamy under Austrian law, even if in doing so he did not comply with the forms of marriage required by Austrian law.²⁵

(5) Divorce.

In virtue of § 76 (1) 1° of the Jurisdiction Act (JN),²⁶ an Austrian court may divorce foreigners only if at least one of the spouses has his habitual place of residence in Austria and if the

²⁰ § 8 sub-p. (1) of the 1st Enabling Ordinance to the Marriage Law of July 27, 1938, DRGBI I, p. 923.

²¹ VwGH Oct. 24, 1946, OJZ 1946, p. 489=JB1 1946, p. 509, note 1.

²² Act of May 21, 1947, BGBl No. 117/1947.

²³ § 76 ABGB which provided for marriage by proxy was abrogated by § 17 of the Marriage Law.

²⁴ Official Circular of the Federal Ministries of Justice and of Internal Affairs of October 11, 1946; Official Gazette of the Federal Ministry of Justice, 1947, p. 13, which bases itself on § 21b and § 21c of the Ordinance of November 4, 1939, DRGBI I, p. 2163, in the version of the Ordinance of October 17, 1942, DRGBI I, p. 597.

²⁵ OGH Dec. 30, 1947, OJZ No. 464/1948. OGH Jan. 28, 1949, OJZ No. 341/1949.

²⁶ In the version of § 19 sub-p. (1) of the 4.DVO and of the law of Oct. 3, 1945, STGBI No. 188/1945.

Austrian judgment of divorce is recognised in the husband's country. The Austrian courts have, however, jurisdiction in matters of divorce, if at least one of the spouses is an Austrian or a stateless person.

Hence, an Austrian court may only divorce citizens of countries which recognise Austrian divorce judgments as do France,²⁷ Poland²⁸ and Switzerland.^{29, 30} It may not divorce citizens of countries where the recognition of Austrian divorce judgments is not assured, as in Czechoslovakia,³¹ Germany,³² Greece,³³ Hungary,³⁴ Italy,³⁵ Liechtenstein³⁶ and Yugoslavia^{37, 38}.

Foreigners cannot stipulate by contract that an Austrian court should be competent to divorce them if it has no jurisdiction under § 76 (3) 1° of the Jurisdiction Act (JN).³⁹

In virtue of § 76 (3) 2° of the Jurisdiction Act (JN) Austrian courts have jurisdiction in suits of nullity brought by the wife of a foreigner, if she was an Austrian citizen at the time of the marriage. The Austrian courts treated an Austrian woman married between 1938 and 1945 as having been an Austrian citizen at the time of the marriage,⁴⁰ thus holding the pretended annexation of Austria by Germany to be null and void.

A judicial separation granted by an Austrian or foreign court is transformed into a judgment of divorce only if at least one of the spouses is an Austrian citizen.⁴¹ A foreign couple may not avail themselves of this privilege.⁴²

²⁷ OLG Vienna Jan. 30, 1946, OJZ No. 65/1946; OLG Vienna June 18, 1947, JBl 1947, p. 446, note 5.

²⁸ OLG Vienna Feb. 19, 1948, OJZ No. 258*/1948.

²⁹ OLG Vienna Feb. 12, 1946, OJZ No. 152/1946.

³⁰ Since these decisions, Belgium, Czechoslovakia, Bavaria and the British Zone of Germany, Great Britain, the Netherlands and Yugoslavia have also declared their readiness to recognise Austrian divorce judgments under certain conditions.

³¹ OLG Vienna Jan. 29, 1946, OJZ No. 66/1946.

³² OLG Vienna Nov. 21, 1945, OJZ No. 8*/1946, confirmed by OGH Jan. 28, 1946, OJZ No. 44/1946=JBl 1946, p. 100; OLG Graz Feb. 6, 1946, JBl 1946, p. 145; OGH Jan. 24, 1946, OJZ No. 98/1946=JBl 1946, p. 142; OGH March 21, 1946, JBl 1946, p. 185.

³³ OLG Vienna Feb. 27, 1946, OJZ No. 125/1946.

³⁴ OLG Vienna Feb. 5, 1947, OJZ No. 159/1947=JBl 1947, p. 175, note 5.

³⁵ OLG Vienna Feb. 6, 1947, OJZ No. 67/1946.

³⁶ As far as Catholic citizens of Liechtenstein are concerned, Liechtenstein has maintained in force the provision of § 111 of the Austrian General Civil Code (ABGB) abrogated in Austria since 1938, which admits divorce only for non-Catholics. OLG Vienna Nov. 5, 1947, OJZ No. 832/1947.

³⁷ OLG Vienna Feb. 27, 1946, OJZ No. 124/1946.

³⁸ Since these decisions, Czechoslovakia, Western Germany and Yugoslavia have begun to recognise Austrian divorce judgments. Citizens of these countries could now be divorced in Austria. Cf. *supra*, note 30.

³⁹ OLG Linz March 27, 1947, OJZ No. 510/1947.

⁴⁰ OLG Vienna Jan. 17, 1946, OJZ No. 68/1946=JBl 1946, p. 120, note 2. OLG Vienna Feb. 20, 1946, JBl 1946, p. 186, note 3.

⁴¹ § 115 of the Marriage Law of July 6, 1938, DRGB I, p. 807, and § 2 of the 4.DVO.

⁴² LG Vienna May 18, 1948, OJZ No. 552*/1948.

The fact that a divorced wife is living abroad does not deprive her of her eventual right to alimony.⁴³ A divorced wife leaving Austria after remarriage with a foreigner loses the custody of her child, as her former husband could no longer exercise his right to supervise the education of his child if it emigrated with its mother.⁴⁴

(6) *Declaration of Death.*

If a foreigner has disappeared without leaving any traces, an Austrian court may issue a decree of declaration of death only in the cases enumerated in § 12 (2) and (3) of the Declaration of Death Law of July 4, 1939, DRGBI I, p. 1186, *i.e.*, if he leaves property in Austria or if his wife is an Austrian citizen or had been an Austrian citizen at the time of her marriage.⁴⁵

§ 17 of the 4.DVO provides that in cases where the choice of law is determined by the nationality of the person concerned, stateless persons are treated as if they possessed the nationality of the country of their residence. After a first decision in the opposite sense,⁴⁶ the Supreme Court rallied to the view that a stateless woman (a *Volksdeutsche* from Czechoslovakia residing in Austria) could avail herself of this provision to have her missing husband declared dead, the fact that she resides in Austria putting her on the same footing as a woman of Austrian nationality.⁴⁷

II. NATIONALITY AND DOMICILE

(1) *Nationality.*

(a) Acquisition and Loss of Austrian Citizenship.

The native Austrian population as well as the refugees now living in Austria have undergone so many changes of nationality since 1918, and the laws concerning Austrian nationality⁴⁸ are so complex, that persons may in good faith make erroneous statements about their present nationality. These facts were even accepted as a valid excuse by the Supreme Court.⁴⁹ If the defendant in a case claims that his opponent is a foreigner,⁵⁰ the latter

⁴³ OLG Vienna July 15, 1948, OJZ No. 657/1948.

⁴⁴ LG Vienna May 18, 1946, OJZ No. 337/1946.

⁴⁵ OGH April 12, 1947, JBI 1947, p. 371.

⁴⁶ OGH April 26, 1947, criticised by Wolff, Todeserklärung Staatenloser in JBI 1948, p. 317.

⁴⁷ OGH May 26, 1948, OJZ No. 616/1948=JBI 1948, p. 317.

⁴⁸ Laws of July 10, 1945, STGBI No. 59 and 60/1945. Laws of Jan. 18, 1946, BGBI No. 51, 52 and 53/1946. Part III of the Law of February 6, 1947 BGBI 25/1947. Citizenship Law Amendment Law of June 9, 1949, BGBI No. 142/1949, and the laws extending the time-limits contained in the above-mentioned laws: BGBI No. 118/1946, BGBI No. 52/1947, BGBI No. 35/1948, and BGBI No. 141/1949.

⁴⁹ OGH Aug. 30, 1947, JBI 1948, p. 66.

⁵⁰ In order to claim from him the *cautio judicandum solvi*, which foreigners must give when suing in Austrian courts cf. notes 14, 19, *infra*.

has to disprove this claim. It is considered too difficult to prove the foreign nationality of another person.⁵¹

The Austrian courts hold all changes in nationality as null and void which are based on the fact of the occupation of Austria by the Germans.⁵² The fact that the Germans, by their decree of July 3, 1938, DRGBI I, p. 790, repealed with retroactive effect an Austrian decree of August 16, 1933, BGBI No. 369, depriving some persons convicted for treason in favour of Germany of their Austrian citizenship, was held ineffective to restore their lost Austrian citizenship to them.⁵³

Austrian law provides that a woman who lost her Austrian citizenship by marriage to a foreigner may regain it even during her marriage if she has resided in Austria since January 1, 1915,⁵⁴ or if the marriage took place between March 13, 1938, and April 24, 1945.^{55, 56} With the consent of her husband, her children may acquire Austrian citizenship together with her. However, if the husband refuses his consent, the Court of Chancery cannot consent in lieu of the husband.⁵⁷ Apart from the cases mentioned above, a married woman may not acquire Austrian citizenship during her marriage, except together with her husband.⁵⁸ In special cases an Austrian woman marrying a foreigner may be authorised to retain her Austrian citizenship.⁵⁹

(b) Acquisition and loss of foreign citizenship.

After the German surrender in 1945 the comparatively favourable treatment of stateless persons⁶⁰ induced many Germans to claim that they had become stateless as Germany did no longer exist as a State. The Supreme Court, however, adhered to the views expressed in an English decision,⁶¹ that a German State and German nationality continue to exist.⁶²

⁵¹ OLG Vienna March 31, 1948, OJZ No. 372/1948.

⁵² VGH Sept. 22, 1949, JBl 1949, p. 534, cf. note 40, as well as notes 46-49.

⁵³ VwGH Jan. 8, 1947, JBl 1947, p. 135.

⁵⁴ § 2 of the Law of July 10, 1945, StGBI No. 59/1945. OGH March 27, 1946, JBl 1946, p. 217. OGH June 10, 1946, JBl 1946, p. 395.

⁵⁵ § 2a of the Law of Jan. 18, 1946, BGBI No. 52/1946. OGH April 24, 1946, JBl 1946, p. 281.

⁵⁶ These provisions mainly served to facilitate the divorce of Austrian women married to Germans, as such divorces were impossible as long as husband and wife were German citizens. Cf. notes 26, 32 and 36.

⁵⁷ LG Vienna March 21, 1947, OJZ No. 215/47.

⁵⁸ VwGH May 18, 1948, JBl 1948, p. 427, note 17.

⁵⁹ § 8 sub-p. (1) Citizenship Law as amended by the Citizenship Law Amendment Law of June 9, 1949, BGBI No. 142/1949.

⁶⁰ Cf. notes 26 and 47.

⁶¹ *R. v. Bottrill, ex p. Kuechenmeister* [1947] 1 K.B. 41.

⁶² OGH Jan. 24, 1946, OJZ No. 98/1946=JBl 1946, p. 142, cf. *supra*, note 32.

OGH Jan. 28, 1946, OJZ No. 44/1946=JBl 1946, p. 100, cf. *supra*, note 32.
OGH March 21, 1946, JBl 1946, p. 185, cf. *supra*, note 32.

The Nuremberg Judgment⁶³ had condemned the German practice of forcing German nationality on the inhabitants of countries occupied since December 31, 1937, who were of German ethnic origin (*Volksdeutsche*) as being contrary to International Law.⁶⁴ In compliance therewith the Austrian courts consider such *Volksdeutsche* who were expelled from their countries of origin since 1945 not as Germans but as stateless persons, whether they come from Czechoslovakia,⁶⁵ Roumania,⁶⁶ South Tyrol⁶⁷ or Yugoslavia.^{68, 69}

(2) *Domicile.*

When the wife of a stateless person asked that a curator of absence be appointed for her husband, this could only be done if the husband had had his last domicile in Austria. This gave rise to an interesting interpretation of the notion of domicile. It was held, that this person, who, while serving in the army, had sent his furniture to Austria and had begun to have a house constructed there, had thereby acquired an Austrian domicile, although he had never actually been in Austria.⁷⁰

III. PROPERTY RIGHTS

The war has so much ruined the respect due to private property, that a lower court had actually ruled, that property left behind by foreigners in their flight did constitute a *res nullius* and could be taken by any person who chose to do so. The Supreme Court in

⁶³ Indictment Count Three, VIII, J—Nazi Conspiracy and Aggression, U.S. Government Printing Office, 1947, Vol. 1, p. 51.

Judgment against the SS Office for the Resettlement of Persons of German Ethnic Origin and against the defendant Frick. Nazi Conspiracy and Aggression. Special Volume, Opinion and Judgment, pp. 98/99 and p. 128.

⁶⁴ They are a violation of Article 45 of the Hague Regulations of 1907 which declares it to be illegal to force the population of an occupied country to swear allegiance to the enemy power.

⁶⁵ OLG Vienna March 7, 1946, OJZ No. 123/1946=JBl 1946, p. 239, note 14. OLG Vienna May 16, 1946, OJZ No. 299/1946. OLG Vienna Jan. 9, 1947, OJZ No. 94/1947=JBl 1947, p. 159, note 4. OLG Vienna March 5, 1947, JBl 1947, p. 244, note 3. OLG Vienna April 9, 1947, OJZ No. 327/1947.

For an identical decision of the High Court for the Control of the Administration, cf. note 21.

For identical decisions of the Supreme Court, cf. notes 46–47.

A decision of the Supreme Court in the opposite sense of May 6, 1946, OJZ No. 432/1946, was rendered before the Nuremberg Judgment (Sept. 30, 1946) had clearly established that these 'naturalisations' were contrary to International Law. It was based furthermore on an erroneous interpretation of the Czechoslovak Decree of August 10, 1945, Coll. No. 33/1945.

⁶⁶ OLG Vienna March 5, 1947, JBl 1947, p. 244, note 2.

⁶⁷ OGH Jan. 19, 1949, OJZ No. 197/1949, cf. however, *supra*, note 7.

⁶⁸ OLG Graz May 27, 1946, OJZ No. 356/1946.

⁶⁹ The author has published a study dealing with the problem of the present citizenship of Displaced Persons of German Ethnic Origin in Vol. 2 *Osterr. Zeitschrift fuer oeffentliches Recht* (1949) pp. 305–340.

⁷⁰ KG St. Poelten June 19, 1946, OJZ No. 338/1946.

reversing this decision, upheld the view (which should have been obvious to begin with) that a fleeing person unable to take with him all his property could not be presumed to have abandoned the rest he left behind.⁷¹

The special courts for the restitution of dispossessed property have held that a person belonging to a class persecuted by the Nazis, who resided outside their sphere of influence, did none the less act under duress when selling his Austrian property between 1938 and 1945. He, therefore, is entitled to restitution of such property.⁷²

A British citizen domiciled in the United Kingdom obtained the restitution of his property situated in Austria, which had been sold by the German Enemy Property Custodian during World War II. Although Germany was not the only country to issue legislation for the control of enemy property, this sale was held to be a measure of Nazi persecution void under the Restitution Law.⁷³

Only the restitution of property dispossessed within what is now Austrian territory may be claimed in virtue of the Austrian Restitution Law. A claim for the restitution of goods dispossessed in the so-called 'Protectorate Bohemia-Moravia' and subsequently brought into Austria was rejected, as an Austrian law cannot declare null and void a transfer of property which took place in another country.⁷⁴

A restitution claim could be brought against the Austrian branch office of a German firm, which was no separate legal entity before 1945. The events of 1945 did not render the branch office a separate legal entity. It could however be made a defendant for the firm as a whole.⁷⁵

Confiscations and Expropriations.

Foreign confiscations have no effect on property situated in Austria. When an Austrian-owned Czechoslovak firm had been nationalised in Czechoslovakia without the owners being compensated, the holders of goods belonging to this firm deposited them with the Vienna Tribunal of Commerce in favour of the nationalised firm. By decision of this Tribunal the goods were however restored

⁷¹ OGH March 7, 1947, OJZ No. 476/1947.

⁷² ROK Vienna Nov. 17, 1947, OJZ No. 52/1948. ROK Vienna, Dec. 5, 1947, OJZ No. 53/1948. ORK Jan. 21, 1948, JBl 1948, p. 144. ORK Feb. 12, 1949, OJZ No. 355/1949.

⁷³ ORK Oct. 2, 1948, JBl 1948, p. 566.

⁷⁴ ORK Oct. 30, 1948, OJZ No. 47/1949=JBl 1949, p. 18. Cf. Schwind's comments on this case in JBl 1949, p. 231, and the similar decisions of U.S. Courts in the *Bernstein Line Cases*, 42 Am.Journal of Int.Law (1948) pp. 217 and 726 and *ibid.* 43 (1949) p. 180.

⁷⁵ ORK Jan. 22, 1949, JBl 1949, p. 191.

to the former owners. The Tribunal rejected the plea of the nationalised firm that this decision was directed against the Czechoslovak State, which should be immune from Austrian jurisdiction. A State could in no case claim sovereign immunity in favour of its commercial enterprises entering into legal contact with persons other than the citizens of the State concerned.⁷⁶

The Austrian Federal Ministry of Property Protection and Economic Planning held that the representatives of a confiscated Czechoslovak Joint Stock Company could not exercise the rights resulting from the fact that this company held 100 per cent. of the stock of an Austrian subsidiary company. A recognition of the voting rights of those representatives at the General Assembly of the Austrian subsidiary company would have been tantamount to a recognition of extra-territorial effect of this foreign confiscation.⁷⁷

When a Yugoslav company was dissolved and confiscated in Yugoslavia, the confiscation had no effect on its assets in Austria. Austria, however, recognised the dissolution of this company and treated it as a deceased person. Austrian law provides that a curator may be appointed to represent a deceased person until his heirs are found.⁷⁸ When an action was brought against the dissolved company, this rule was applied and a curator appointed to represent it.⁷⁹

A company dissolved and confiscated abroad may not only be sued, but also bring suit. This decision appears to have been based on the fact that under Austrian law the power of attorney of a lawyer survives the death of the person (dissolution of the company) represented by him, until the heirs of the deceased (the members of the dissolved company) revoke it. Thus a lawyer representing a foreign company could collect a debt due to it from an Austrian debtor, notwithstanding the fact that the company had been dissolved and confiscated abroad since the suit was brought. The confiscating State had allotted all assets of the company to a nationalised firm which attempted to oust the lawyer from the suit and to collect the debt. This claim was rejected by the Supreme Court. Austria can grant extra-territorial effect only to expropriations, *i.e.*, to cases where the foreign State claiming private property in Austria had paid a just indemnity to the previous owner. If the foreign State refused to pay an indemnity, or paid an indemnity considered insufficient by the Austrian courts,

⁷⁶ Vienna Tribunal of Commerce, June 21, 1948, reported in *Die Wirtschaft*, weekly edition, August 21, 1948.

⁷⁷ Weiss-Thessbach, *Zur extraterritorialen Wirkung von auslaendischen Verstaatlichungsmassnahmen*, JBl 1948, p. 352.

⁷⁸ 155 Zivilprozessordnung ZPO = Code of Civil Procedure.

⁷⁹ OLG Vienna March 3, 1948, OJZ No. 307/1948.

this would constitute a confiscation which—as stated above—has no extra-territorial effect.⁸⁰

The Austrian Supreme Court applied this rule even to confiscations in virtue of Austrian legislation. It held, that a confiscation pronounced by Austrian authorities in the course of Austrian denazification measures could not affect property situated outside Austria.⁸¹

IV. CONTRACTS

(1) *German debts.*

The impossibility of transferring money from Germany to Austria does not amount to frustration absolving a German firm from settling a debt, as it could sell its Austrian real estate⁸² or cede its claims against Austrian debtors. These judgments chose to ignore the fact that such transactions are contrary to German Currency Control Laws and that such assets may in certain cases be claimed by the Allies in virtue of the Potsdam Agreement as 'German property'. Should the Allies make such claims, they would not invalidate these judgments but 'merely render their execution illusory'.⁸³

In the same way, an order of an Occupying Power in Austria, prohibiting the defendant German firm from paying a debt, does not protect it against being sentenced to pay the debt. However, execution of such a judgment would almost always be impossible.⁸⁴

Other courts were more realistic and refrained from giving judgments they knew very well to be unenforceable. Thus another court held that the future fate of the Austrian assets of a German debtor was so uncertain that they could not form a satisfactory security for a loan.⁸⁵

(2) *Currency Control.*

A contract fixing a higher than the official rate of exchange for foreign currencies is null and void.⁸⁶ However, when in the case of a person having sold counterfeit dollars on the black market, the court had to impose a punishment corresponding to the prejudice caused, it applied the black-market rate of exchange to evaluate this prejudice.⁸⁷

The ordinance introducing the Reichsmark in the province of

⁸⁰ OGH July 9, 1948, OJZ No. 773/1948.

⁸¹ OGH May 10, 1948, JBl 1949, p. 70.

⁸² LG Vienna May 23, 1947, JBl 1947, p. 494, note 6.

⁸³ OLG Vienna March 10, 1947, OJZ No. 252/1947.

⁸⁴ OGH Oct. 20, 1948, JBl 1949, p. 128.

⁸⁵ LG Vienna June 27, 1947, JBl 1948, p. 18, note 12.

⁸⁶ OLG Vienna May 28, 1948, OJZ No. 518/1948.

⁸⁷ OGH April 11, 1949, OJZ No. 601/1949.

Austria of April 23, 1938, DRGBI I, p. 405, had fixed a rate of exchange of three Austrian schilling for two Reichsmark. The Schilling Law of November 30, 1945, StGBI No. 231/1945, re-introducing the schilling, had provided a rate of exchange of one Reichsmark for one Austrian schilling. All amounts expressed in Austrian schilling before 1938 must, therefore, be reduced by one third.⁸⁸

(3) *Situs of Debts.*

The Schilling Law did not convert a bill of exchange payable in Berlin in Reichsmark in May, 1945, and drawn in Vienna in February, 1945, into a bill of exchange payable in schilling in Vienna, as it was no debt situated in Austria.⁸⁹ Yet, the instrument concerned had never left the Vienna bank where it was issued. A debt secured by a mortgage on the Austrian house of a foreign debtor in favour of a foreign creditor is a debt situated in Austria.⁹⁰

(4) *Form of Transfer of Property.*

Austrian law only recognises the titles and forms of transfer of movable and immovable property provided by the *lex rei sitæ*.⁹¹ In addition to this, an Act which intends to have effect in Austria must comply with Austrian law (§ 4 ABGB). A contract before a public notary in Germany whereby a German couple ceded their movable property situated in Austria to an Austrian citizen gave him no legal title to this property, as this kind of transfer of movable property is not provided in Austrian law⁹² (§ 426, § 427, ABGB).

Although in France the property in shares may be transferred by mere contract without handing over of the shares, such a contract made in France by an Austrian in respect to shares situated in Austria did not validly transfer the property of these shares, as Austrian law does require actual handing over to effect such transfers.⁹³

V. RULES OF PROCEDURE

(1) *Immunity of Foreign States.*

As a rule, foreign States are immune from Austrian jurisdiction. An action against a foreign State for the payment of a debt is not

⁸⁸ OLG Vienna Jan. 29, 1946, OJZ No. 82/1946. OLG Graz March 25, 1946, OJZ No. 350/1946.

⁸⁹ OGH Dec. 6, 1947, JBl 1948, p. 90.

⁹⁰ OGH July 9, 1948, OJZ No. 773/1948.

⁹¹ This is one of the rules which prevent the recognition of extra-territorial effect to foreign confiscations.

⁹² OLG Vienna July 15, 1948, OJZ No. 654/1948.

⁹³ ORK Feb. 12, 1949, OJZ No. 355/1949.

admitted.⁹⁴ Thus an action for the recovery of a debt brought against the German State during the German occupation of Austria could not be continued after 1945.⁹⁵

Austrian courts have jurisdiction over a foreign State only if it renounces its immunity or if the action concerns its real estate situated in Austria, or rights connected therewith.⁹⁶ Thus a person having a mortgage on a house belonging to a foreign State could sue it for payment of interest.⁹⁷ However, the action of the tenants of a house belonging to a foreign State for the refunding of the cost of repairs advanced by them was rejected, as it did not directly concern the foreign State's real estate.⁹⁸ An Austrian house owner could not give notice to a foreign State which had rented his house, as the house concerned did not belong to the foreign State.⁹⁹ Only in this case would the Austrian court have had jurisdiction.

Actions against Germany for the restitution of dispossessed property are admitted regardless whether they concern immovable or movable property.

The London Declaration of January 5, 1943, is considered as a special rule of International Law abrogating the general rule concerning the immunity of foreign States from local jurisdiction. In such suits against Germany, a curator of absence is appointed to represent interest.¹

Not only foreign States as such are exempted from Austrian jurisdiction, but also their State railways if they form part of their public services.² However, a foreign State is not immune from Austrian jurisdiction in suits concerning its commercial enterprises.³ In the same way a joint stock company registered in Austria remains subject to Austrian jurisdiction, even if 100 per cent. of its shares are in the hands of a foreign State, as it continues to have an existence of its own different from the foreign State.⁴

Members of the Allied Occupation Forces in Austria and their families are immune from Austrian jurisdiction in civil law suits, as well as in criminal cases.⁵

⁹⁴ OLG Vienna March 23, 1946, OJZ No. 351/1946. Cf., however, the restriction of this principle as exposed in the case mentioned *supra*, note 76.

⁹⁵ OLG Vienna Oct. 10, 1946, OJZ No. 611/1946.

⁹⁶ Art. IX sub-p. (2) of the *Introductory Law to the Jurisdiction Law* (Einfuehrungsgesetz zur Jurisdiktionsnorm EGzJN). OGH Sept. 17, 1947, JBl 1947, p. 491. Cf. also *supra*, note 76.

⁹⁷ OLG Vienna June 12, 1946, OJZ No. 258*/1946.

⁹⁸ OLG Vienna Nov. 21, 1946, OJZ No. 12/1947.

⁹⁹ LG Vienna Oct. 24, 1946, OJZ No. 640/1946.

¹ OGH Oct. 20, 1947, JBl 1947, p. 517.

² OGH Sept. 17, 1947, JBl 1947, p. 491.

³ Cf. *supra*, note 76.

⁴ LG Vienna April 25, 1947, OJZ No. 362*/1947.

⁵ OLG Vienna March 10, 1949, OJZ No. 314/1949. LG Vienna Jan. 28, 1949, OJZ No. 358/1949.

The Austrian Government may by Ordinance grant diplomatic privileges and immunities to International Organisations, to their officials and to delegates of member-States to these Organisations.⁶

(2) *Conflict of Laws in Matters of Procedure.*

Austrian courts may decide a case notwithstanding the fact that the same case is pending before a foreign court if the foreign judgment could not be enforced in Austria.^{7, 8}

An Austrian court cannot issue a decree whereby a foreign document is declared null and void.⁹

(3) *Curators of Absence.*

The difficulty of communications in 1945 made it necessary to appoint curators of absence for Austrians¹⁰ and foreigners¹¹ living abroad, even if their addresses were known. Such curators were also appointed for the German State and for a company dissolved abroad.¹²

The curator cannot state on oath that the absent person represented by him is destitute.¹³

(4) *Cautio judicandum solvi.*

Foreigners appearing in Austrian courts have to give their opponents a security for the costs of the case.¹⁴ A house which is the object of the suit cannot constitute such a security.¹⁵

Stateless persons and citizens of countries granting the same privilege to Austrian citizens¹⁶ are exempted from this obligation.¹⁷

Notwithstanding the fact that he may continue to live abroad, the *cautio judicandum solvi* shall be returned to a foreign plaintiff who becomes an Austrian citizen or a stateless person while the suit is pending.¹⁸

A British citizen claimed to be exempted from giving the *cautio*

⁶ Law of June 30, 1948, BGBl No. 155/1948.

⁷ Cf. *infra*, note 20.

⁸ OLG Graz July 5, 1946, OJZ No. 437/1946 (Yugoslavia). OLG Vienna March 12, 1947, OJZ No. 256/1947 (Yugoslavia). OLG Vienna July 18, 1946, OJZ No. 493/1946 (Germany).

⁹ OLG Vienna Dec. 11, 1945, OJZ No. 23/1946.

¹⁰ OLG Vienna Nov. 8, 1946, JBl 1946, p. 58.

¹¹ LG Vienna Nov. 30, 1946, JBl 1946, p. 59.

¹² Cf. *supra*, notes 78 and 1.

¹³ OGH July 17, 1946, OJZ No. 435/1946 = JBl 1946, p. 461, reversing OLG Vienna May 16, 1946, OJZ No. 300*/1946.

¹⁴ § 57 Code of Civil Procedure and OLG Vienna June 19, 1947, JBl 1947, p. 446, note 7 (U.S.A.). OLG Graz March 18, 1946, OJZ No. 434/1946 (U.S.A.).

¹⁵ OLG Vienna Feb. 28, 1946, OJZ No. 126/1946.

¹⁶ This is the case in Czechoslovakia, Denmark and Yugoslavia.

¹⁷ LG Vienna May 20, 1946, OJZ No. 363/1946. OLG Vienna May 28, 1947, OJZ No. 409/1947.

¹⁸ OLG Vienna Oct. 28, 1948, OJZ No. 14/1949.

judicandum solvi by stating that he had no assets abroad and that he was prevented by the British Currency Control Laws from transferring any of his British assets for this purpose. This fact did not put him in the same position as a destitute pauper exempted from giving the *cautio* as it may also be given without transferring funds (e.g., by the pledge of an Austrian surety¹⁹).

(5) *Reciprocity in Matters of Procedure.*

Judgments rendered in countries which refuse to execute Austrian judgments cannot be enforced in Austria.²⁰ The privileges of judicial assistance to the poor are granted to poor citizens of countries which grant the same privileges to Austrians in the same situation.²¹

VI. GENERAL PRINCIPLES OF PRIVATE INTERNATIONAL LAW

(1) *Reciprocity.*

Although all the decisions quoted are in accordance with the general principles of Private International Law, some of them comment *expressis verbis* on these principles. Thus one decision has re-affirmed that Austria adheres to the principle of formal reciprocity, i.e., Austria demands that the foreign State treats Austrians like its own subjects, but it does not request the foreign State to treat Austrians as Austria treats the subjects of this State.²²

However, aliens intending to acquire immovable property in Austria are no longer required to prove that their own country does not discriminate against Austrians in this respect. § 33, sub-p. (2) ABGB containing the general clause concerning formal reciprocity has in so far been abrogated by the German Ordinance of January 23, 1940, DRGBI I, p. 230.

(2) *Public Policy.*

Before 1938, Austrian law did not contain any clause stating *expressis verbis* that, if Private International Law demanded the application of foreign law, it would none the less be rejected if it were contrary to Austrian public policy. However, even then, the Supreme Court used this notion to exclude the application of certain foreign laws.²³

¹⁹ OLG Vienna June 29, 1949, OJZ No. 564/1949.

²⁰ OLG Vienna Nov. 20, 1947, OJZ No. 16*/1948 (Poland).

²¹ This is the case in Bavaria (OLG Vienna, July 15, 1948, OJZ No. 667/1948), in the British Zone of Germany, Bulgaria, Czechoslovakia, Denmark, Hungary, Switzerland and Yugoslavia.

²² LG Vienna Aug. 31, 1946, OJZ No. 547/1946.

²³ OGH Oct. 9, 1930, Rechtsprechung 1931, No. 4, p. 11.

The German rules on the conflict of laws in the sphere of family law contain a public policy clause which was maintained in force in Austria. A decision of the Supreme Court gives an interesting interpretation of this clause.²⁴

(3) *Limits of the application of Private International Law Rules.*

Another decision shows the limits of the application of the rules of Private International Law. If the choice of law depends on the nationality of a person at a given moment and if he was a foreigner at this time, the foreign law is not applied, although these rules require it, if the person concerned has in the meantime acquired Austrian citizenship.²⁵

I. SEIDL-HOHENVELDERN,²⁶

²⁴ Cf. *supra*, note 12, giving a definition of the notion of public policy and notes 6, 9, 76-81.

²⁵ Cf. note 8.

²⁶ Austrian Federal Chancery. Legal Adviser to O.E.E.C.

THE SUPPRESSION OF SLAVERY IN INTERNATIONAL LAW—II

(Concluded from p. 51 ante)

THE PERIOD BETWEEN THE TWO WORLD WARS

The 1919 Peace Treaties.

In the Covenant of the League of Nations, embodied in the Peace Treaties of Versailles, St. Germain and Trianon, and the abortive Treaty of Sèvres, the victorious powers in Article 23 (*b*) set out certain postulates in favour of the native inhabitants of territories under their control and in Article 22 laid down principles for the administration of non-self-governing territories. The provisions of Articles 22 and 23 (*b*) will be discussed below.

By Article 126 of the Versailles Peace Treaty of June 28, 1919 (112 *British and Foreign State Papers* 75), Germany undertook to 'accept and observe the agreements made or to be made by the Allied and Associated Powers or some of them with any other power with regard . . . to the matters dealt with in the General Act of Berlin of February 26, 1885, and the General Act of Brussels of July 2, 1890, and the Conventions completing or modifying the same'. The agreement here referred to was the 1919 Convention of St. Germain-en-Laye.

The Convention of St. Germain-en-Laye.

In the preamble of this Convention signed at St. Germain-en-Laye on September 10, 1919 (8 *League of Nations Treaty Series* 26; A.J.I.L. 15 (1921) Suppl. 314), the signatories declared that the territories to which the 1885 Berlin General Act and the 1890 Brussels General Act applied were 'now under the control of recognised authorities', were 'provided with administrative institutions suitable to the local conditions, and the evolution of the native populations' and continued 'to make progress'. The signatories therefore expressed their wish to 'ensure by arrangements suitable to modern requirements the application of the general principles of civilisation established by the Acts of Berlin and Brussels'. Consequently, by Article 13 of this Convention the 1885 General Act of Berlin and the 1890 General Act of Brussels were abrogated.

Article 14 provides for adhesion to the Convention by 'States

exercising authority over African territory and other States members of the League of Nations which were parties either to the Act of Berlin or to the Act of Brussels or the Declarations annexed thereto'. Only Abyssinia adhered to Article 2, section 1, which, however, does not deal with slavery (April 15, 1924, 25 *League of Nations Treaty Series* 180).

The signatories of the St. Germain Convention were Belgium, Great Britain, who signed also for Canada, Australia, South Africa, New Zealand, and India; France, Italy, Japan, Portugal, and the United States. All with the exception of Italy and the United States ratified the Convention. The Powers bound by the Berlin or Brussels General Acts who did not ratify or adhere to the 1919 Convention are still bound by the Berlin and Brussels General Acts respectively. These States are Austria, Denmark, Germany, Hungary, the Netherlands, Norway, Iran, Spain, Sweden, and the U.S.S.R.

In paragraph 1 of Article 11 of the 1919 Convention which in substance re-enacts Article 6 of the 1885 Berlin Act, it was provided that 'the signatory Powers exercising sovereign rights or authority in African territories will continue to watch over the preservation of the native population and to supervise the improvement of the conditions of their moral and material well-being. They will, in particular, endeavour to secure the complete suppression of slavery in all its forms and the slave-trade by land and sea'.

The 1919 Convention did not go as far as the General Acts of Berlin and Brussels. The provisions for penal legislation enacted consequent upon the coming into force of Article 5 of the Brussels General Act still remained law, but the rights of visit and search granted under Article 22 of the Brussels General Act were abrogated and the international bureau created by Article 27 of the Brussels General Act was abolished.

The Mandate System.

In Article 23 (b) of the League of Nations Covenant the Members of the League undertook 'to secure just treatment for the native inhabitants of territories under their control'. Moreover, in Article 22 an administrative system for non-self-governing territories was initiated. This was the mandate system. The application of its principles has survived the League in the Trusteeship System of the United Nations. Certain communities, peoples, and territories were placed under the tutelage of the Allied and Associated Powers, who undertook the responsibility of their administration. The Covenant did not contain specific references to anti-slavery provisions in the A mandates. The mandates for Palestine and

Transjordan and for Syria and Lebanon and all B mandates envisaged, however, adherence to anti-slave-trade conventions.

The duty of the mandatories to prohibit abuses such as the slave-trade were embodied in paragraphs 5 and 6 of Article 22 of the Covenant as well as in the mandate treaties for the B and C mandates.

The B mandates were the Cameroons and Togoland (the greater part administered by France, the rest by Great Britain), Tanganyika (Great Britain), and Ruanda and Urundi (Belgium). The C mandates were: Samoa (New Zealand), Nauru and former German south equatorial possessions (Australia), north equatorial possessions (Japan). The C mandate for South West Africa has not yet been surrendered by the mandatory, the Union of South Africa.

In the B mandates the mandatory was 'responsible for the peace, order, and good government of the territory and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants' (Article 3, Tanganyika mandate). The mandatory was further obliged to

' . . . provide for the eventual emancipation of all slaves and for as speedy an elimination of domestic and other slavery as social conditions will allow;

. . . suppress all forms of slave-trade;

. . . prohibit all forms of forced or compulsory labour except for essential public works and services and then only in return for adequate remuneration;

. . . protect the natives from abuse and measures of fraud and force by the careful supervision of labour contracts and the recruiting of labour' (Article 5, Tanganyika mandate).

The provisions against slavery were, however, only embodied in the B mandates, the C mandates providing only for the abolition of the slave-trade.

The Permanent Mandates Commission was a body created for the purpose of supervising the exercise of the mandatories' powers in the territories entrusted to their care, and with the co-operation of the mandatories was to a great extent successful in the suppression of slavery. A much greater success, however, fell to the League as a whole in the suppression of slavery on a universal basis.

The constitution of the Permanent Mandates Commission (envisaged in paragraph 9 of Article 22 of the Covenant) was resolved upon by the League on December 1, 1920, and the first members were elected on February 22, 1921. The Commission consisted first of nine individual members. This number was raised to ten and during Germany's membership to eleven. When labour

questions were under discussion, one expert nominated by the International Labour Office was present. The majority of Commission members were nationals of non-mandatory States. The Commission had a separate secretariat, the Mandates Section of the League of Nations.

The mandate system provided for annual reports to be submitted by the mandatories based on questionnaires from the Permanent Mandates Commission. These questionnaires dealt with all aspects of the duties incumbent upon the mandatories, and therefore with slavery and the slave-trade, labour conditions, and the arms and ammunition traffic.

The annual reports formed the basis for discussions in the Permanent Mandates Commission. Mandate representatives attended and answered questions, and decisions and observations of the Commission together with those of the mandatories' representatives were forwarded to the Council.

The mandate system provided also for petitions to be submitted to the Commission by private individuals through the mandatories who added their own observations. Except in cases where the Commission thought that they did not call for special action, they forwarded such petitions to the Council of the League with their recommendations. In appropriate cases they added their hope that the facts complained of would be remedied or their regret at the facts which had given rise to the petition.

The mandatory Powers continued to submit their reports even during the Second World War, although the Permanent Mandates Commission did not assemble during that time.

The trusteeship system set up under the auspices of the United Nations has many features in common with the mandate system. It envisages, in addition, periodic visits by qualified experts to the trust territories (Article 87 (b) of Chapter XIII of the United Nations Charter and, *e.g.*, Article 2, No. 3 of the Trusteeship Agreements for Togoland (A/154/Rev. 2) and the Cameroons (A/155/Rev. 2), both dated December 12, 1946, where the French Government undertakes 'to facilitate such periodic visits to the territory as the General Assembly or the Trusteeship Council may decide to arrange . . .'). The duty to submit annual reports and the right to petitions has been maintained under the trusteeship system.

'The League went far beyond regional enforcements on the African continent of the convention revising the Berlin and Brussels Acts, signed at Saint Germain in 1919. It extended even more stringent provisions to all continents. The League applied to the whole world a mandate clause which the Covenant sought to apply,

in a weaker form, merely to the few mandated territories. This was a victory for Article 23 (b), rather than Article 22 of the Covenant' (H. Duncan Hall, *Mandates, Dependencies, and Trusteeships*, London, 1948, p. 239).

In 1922, at its Third Session, the Assembly of the League of Nations took up the question of slavery. In 1924 a Temporary Slavery Committee was set up, three of whose members were also members of the Mandates Commission. Thus, 'the Mandates Commission, through its members acting individually, . . . took an important, if indirect part in the preparations that led finally to the drafting and opening for signature at the Seventh Assembly of the Slavery Convention of September 25, 1926' (Hall, *op. cit.*, p. 240).

The Temporary Slavery Commission.

The Third Assembly of the League of Nations decided on September 21, 1922, that the question of slavery should be included in the agenda of the Fourth Assembly and requested the Council 'to present to that Assembly a report on the information which it shall have received on the matter' (*Official Journal*, October, 1922, Special Supplement No. 9, p. 37).

In order to do this, the Council on September 25, 1922 instructed the Secretary-General of the League of Nations 'to study the question and, in particular, to request the governments of the members of the League to supply any information on the existing situation which they possess and which they may see fit to communicate to it' (*Official Journal*, November, 1922, p. 1203). This was done and less than a year later, on August 10, 1923, the Council decided to communicate to the Fourth Assembly the reports until then received.

A number of States had replied that there was no information concerning slavery they could usefully communicate (A. 18. 1923. VI. p. 15). Replies containing information were received from eleven States (A. 18. 1923. VI).

The Assembly on September 28, 1923, considered that the information received could not form the basis of a sufficiently complete report and therefore—adopting a proposal of the Norwegian delegate Dr. Nansen—requested the Council 'to entrust to a competent body the duty of continuing the investigation with a view to obtaining further information on the subject, particularly from governments of States not members of the League and if necessary from individuals or organisations whose competence and reliability are recognised' (A. 117. 1923. VI). The importance of this resolution lies in the fact that the League had not solely to rely on

information from governments, some of whom were themselves unable or unwilling to co-operate in the suppression of slavery. Moreover, such private information supplemented that which came from official sources, even in cases where the latter could not be considered to be scanty or biased.

In pursuance of this Assembly resolution the Council took two steps : the first was an instruction to the Secretary-General to make further inquiries, the second the setting up of the Temporary Slavery Commission.

On December 11, 1923, the Council instructed the Secretary-General 'to inquire of those States in the present territory and colonial possessions of which slavery has been known to exist in the past, to consider the possibility of communicating to the Council information on the following points :

(a) What means, legislative, administrative or other, have been applied in the territory of . . . or in the colonies or protectorates under its sovereignty, to secure the suppression of slavery?

(b) What have been the results of the application of these measures? Has slavery thereby been automatically and completely suppressed or is it gradually dying out? What are the economic and social results of the measures taken for the former masters, for the slaves, for the government, and for the development of the territory involved? Is it intended to supplement the measures already taken by any further governmental action?'

At the same time the Secretary-General was instructed 'to inquire of the above-mentioned States whether they would see any objection to indicating any organisation or individual in their country who might be able to give reliable and valuable additional information on this subject'.

The Secretariat sent these inquiries to all League members and to the governments of Afghanistan, Ecuador, Egypt, Mexico, Saudi Arabia, Turkey and the United States. Ten governments replied that they had no useful information to communicate. Communications, the full text of which has been published by the League, were received from eighteen governments (C. 209. M. 66. 1924. VI, and A. 25 (a). 1924. VI).

The second step taken by the Council in pursuance of the Assembly resolution of September 28, 1923, was to appoint a committee of experts—the Temporary Slave Commission—on June 12, 1924 (*League of Nations Monthly Summary IV*, 1924, Vol. IV, No. 6, June, 1924, p. 123).

The Commission submitted in July of the same year in their *First Report* a summary of the various questions which it might consider. The points were these :

(1) *Slavery*:

- (a) enslaving of persons; slave-raiding and the slave-trade;
- (b) slave-dealing (including transfer by exchange, sale, gift, or inheritance);
- (c) slavery or serfdom (domestic or predial).

(2) *Systems analogous to slavery*:

- (a) acquisition of girls by purchase disguised as payment for dowry, it being understood that this does not refer to normal marriage customs;
- (b) adoption of children, of either sex, with a view to their virtual enslavement or the ultimate disposal of their persons;
- (c) all forms of pledging or reducing to servitude of persons for debt or other reason.

In a separate category were placed compulsory labour, public or private, paid or unpaid.

The Commission also expressed the opinion that the question of slavery must be regarded from a comprehensive standpoint and that it should endeavour to indicate some practical measures calculated in its opinion to ensure the gradual suppression of slavery and analogous forms of servitude and to facilitate the development of the social and economic conditions which should succeed it. It was recognised that this was a very delicate task, but it was believed that it would be possible to offer suggestions of a practical nature which might be of value to the States which were endeavouring to meet the problems with which they were faced in their efforts to secure the gradual suppression of all forms of slavery. The Commission was, however, disinclined to recommend to the Council the dispatch of a further questionnaire, lest it should trespass on the forbearance of the governments, but expressed its desire for further information from official sources (A. 17. 1924. VI).

On July 25, 1925 (A. 19. 1925. VI), the Commission presented its *Second Report* to the Council. It expressed regret at the fact that it had been unable to lay before the Council a complete statement of the existing situation in regard to the different subjects included in its programme. The report of the Commission should be regarded, therefore, as a statement of that situation in so far as it is revealed by the information at its disposal. The Commission adopted the view that attention should primarily be directed towards those aspects of slavery which were adopted or tolerated by governments and which, though not approved, they found difficulty in immediately abolishing. Isolated cases of contravention of laws relating to slavery might be left like other crimes to prosecution before courts.

The Second Report was based on information received from governments, notes from organisations or persons designated by their governments, and the personal experience and knowledge of the members of the Commission. Thirty-one governments had supplied information and in September, 1925, additional communications from several governments were received by the Council. Sixteen governments had replied that they could give no useful information on the subject. The Commission regretted that some governments whose reports would have been of special interest had not replied to the invitation of the League.

In the report the following aspects of the problem were dealt with and remedial suggestions made: crude slavery, including slave-raiding, slave-dealing and the smuggling of young persons to the slave markets; in addition systems akin to slavery, such as pawning, debt-bondage and domestic slavery.

The Convention on Slavery of 1926.

On September 26, 1925, the Assembly was presented by its Sixth Committee with the Draft Convention (A. 130. 1925. VI) which led finally to the drafting and opening for signature at the Seventh Assembly of the Convention on Slavery—Geneva, September 25, 1926 (C. 586. M. 223. 1926. VI.—60 *League of Nations Treaty Series* 253, No. 1414: A.J.I.L. 21 (1927), Suppl. 171). For the text of the Convention with comments and explanations, see United Nations document E/AC.33/3 entitled 'The Suppression of Slavery and the Slave Trade by Means of International Agreement'.

This Convention was signed and ratified by a great number of States. The latest ratification list (C. 25. M. 25. 1943. V. Annex p. 137) shows that forty-eight States or territories have ratified the convention or acceded to it.

In the preamble the signatories expressed the wish to complete and extend the work accomplished under the Brussels General Act and the conviction that forced labour must be prevented from developing into conditions analogous to slavery.

In paragraph 1 of Article 1 for the first time in the history of international law the contracting Powers agreed on a definition of slavery and in paragraph 2 of the same Article the slave trade is defined. Both definitions are given in the chapter of this article on the scope of the present study (*supra*). In the definition of both slavery and the slave-trade, the word 'person' is used in its non-technical sense and the definition of the slave-trade comprises all acts of slave-trading.

The Powers undertook each in their territorial waters, on all ships under their flag (Article 3), and within the territories under

their sovereignty, jurisdiction, protection, suzerainty or tutelage to prevent the slave-trade, but bound themselves to abolish slavery completely, in all its forms merely *as soon as possible* (Article 2). Penal laws were to be enacted as sanctions (Article 6). The existence of forced labour was recognised, with certain safeguards, in Article 5. This part of the Convention was expressly excluded from the United States instrument of accession, as forced labour contravenes the Thirteenth Amendment to the United States Constitution. This is an instance of a reservation expressed in an instrument of accession resulting in an extension of the acceding Power's obligations.

In Article 7 the High Contracting Parties undertook to communicate to each other and to the Secretary-General of the League of Nations any laws and regulations which they might enact with a view to the application of the provisions of the present Convention. In Article 3, the signatories undertook to conclude a convention for the prevention of the slave-trade at sea which would give them similar rights and duties to those laid down in the Convention signed at Geneva on June 17, 1925, for the Supervision of the International Trade in Arms (A. 13. 1925). This Convention has not, however, been concluded. This armament trade Convention gives the war-ships of the signatories within a strictly defined zone the right to visit certain vessels of low tonnage flying no flag or that of one of the signatories, in order to verify the nationality of the vessel by examining the ship's documents. In a case where no right to a flag is established, the captor State may dispose of the vessel according to his own law. In case of misuse of a flag the vessel may be handed over to the State whose flag had been misused.

The importance of the 1926 Convention on Slavery lies in the fact that for the first time in international law slavery and the trade in slaves were defined. As far as the prohibition of the slave-trade is concerned, the 1841 (Quintuple) Treaty of London went further in that it bound the governments concerned to prohibit to their subjects not only the slave-trade but also the investment of capital in slave-trading. The Brussels General Act expressly recognised the legality of certain forms of slavery. Although the parties to the 1926 Convention did not follow this example, they merely bound themselves to abolish slavery at a future date. They themselves are to judge how soon it will be possible to abolish slavery in all its forms. From this it follows that in the meantime slavery in the respective countries is not illegal. Moreover, slavery is still not piratical. With regard to visit and search, the Brussels General Act went further, because it gave this right at least within a limited

area and under certain well-defined conditions. The 1926 Convention merely promised the conclusion of a further Convention on the subject.

Bilateral Treaties.

It was not expected in 1926 and even for some time after the signature of the Convention that it would command general adherence. Powers like the United States and Great Britain endeavoured therefore to succeed with their plans for the suppression of slavery by means of bilateral treaties. An important agreement was the *Treaty of Jeddah* concluded between Great Britain and Saudi Arabia on May 20, 1927, ratified there on September 17, 1927 (Cmd. 2941). In Article 7 of this treaty 'His Majesty the King of Hejaz and of Nejd and its Dependencies undertakes to co-operate by all means at his disposal with His Britannic Majesty in the suppression of the slave-trade'. Lady Simon has commented on the insufficiency of this Article (*Slavery*, p. 50), but its provisions represented the maximum of co-operation the British Government were able to secure. (See two Notes dated May 19, 1927, Cmd. 2951.)

On February 10, 1934, Great Britain requested Yemen to give an assurance of assistance to the British Government by all possible means in the prevention of the African slave-trade by sea and in a Note of even date this assurance was given (157 *L. of N. Treaty Series* 72).

The results of an inquiry made by the League of Nations and U.S. officials in Liberia are reported in L. of N. doc. No. C. 658. M. 272. 1930. VI, dated Geneva, December 15, 1930. (Cf. article 'The Suppression of Slavery', 2 *Geneva Special Duties*, No. 4, April, 1931.)

The Convention Concerning Forced or Compulsory Labour.

This Convention, concluded under the auspices of the International Labour Office, was adopted at Geneva on June 28, 1930, and entered into force on May 1, 1932 (5 Hudson, *International Legislation*, Washington, 1936, p. 609, restated in Articles 764 ff. of the International Labour Code, 1939, I.L.O., Montreal, 1941). On September 1, 1939 the following eighteen members of the International Labour Office were bound by the Convention: Australia, Bulgaria, Chile, Denmark, Finland, France, Great Britain, Ireland, Italy, Japan, Liberia, Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, and Yugoslavia. It is also in force for Nicaragua and became binding on Switzerland in 1941.

In view of the fact that discussions in the past and again during

the ninth session of the Economic and Social Council have shown that the Powers wish to deal with forced labour apart from slavery, the Convention is referred to here very briefly.

Article 2 defines forced or compulsory labour as meaning all work or service exacted under menace of penalty for which a person has not offered himself voluntarily. Certain categories are, however, excluded from the definition, as military service, service consequent upon a conviction by a court of law, public service in case of emergencies, etc.

In Article 1 the ratifying members of the International Labour Office undertake to suppress compulsory labour within the shortest possible period. Certain safeguards for the protection of labourers are stipulated. Article 25 binds the ratifying States to take penal action against anyone illegally exacting forced labour.

It is to be noted that in the International Labour Code forced labour is not suppressed, but regulated, in so far as it can be enacted as a tax or for the execution of public works.

The Advisory Committee of Experts.

By resolution of September 25, 1931, the Assembly of the League of Nations provided for the setting up of a small committee of experts on slavery (1931 *Official Journal* 2295). In pursuance of this, the Council on September 29, 1931, passed a resolution which led to the appointment of the Committee of Experts on Slavery on January 28, 1932 (League of Nations Document C. 120. 1932. VI, *Official Journal*, 1932, Part III, p. 482) and in the same year the Council presented the Committee's report (A. 34. 1932. VI) to the Assembly. Following this report the Assembly on the unanimous proposal of its Sixth Committee decided on October 12, 1932, on the setting up by the Council of an Advisory Committee of Experts. This Committee was to be composed of seven members chosen solely for their special knowledge. It was to meet bi-annually. It had no powers of supervision, its capacity being strictly advisory. Its task was

(1) to study and examine the documents supplied or transmitted by governments to the Secretariat; (2) to study, on the basis of such documents and of the special knowledge of its members, the facts and institutions mentioned in Article 1 of the 1926 Slavery Convention and to examine their role in the social system; (3) to study the means of gradually abolishing these institutions or customs, or of directing their development in such a way as to deprive them of any objectionable features; (4) at the request of the Council to examine, if a country where slavery exists asks for financial assistance from the League of Nations in settling questions relating

to the abolition of slavery, the objects for which this financial assistance is requested, the minimum amount necessary and the guarantees offered. It was provided that the Committee should not deal with questions relating to Article 5 of the 1926 Slavery Convention which deals with forced labour.

As far as procedure was concerned, it was provided, *inter alia*, that (1) the consultation of organs or persons on facts concerning slavery was not permitted. These organs or persons had to send their complaints or observations through the intermediary of their respective governments. (2) If a communication concerning a country was addressed to the Committee by the government of another State, the Committee was to transmit it, through the intermediary of the Council, to the government of the country concerned for its observations. (*League of Nations Official Journal*, November, 1932, Special Suppl. No. 103, pp. 24ff.)

On January 24, 1933, the Council resolved to set up the Advisory Committee which first met from January 8 to 10, 1934 at Geneva to draw up its rules of procedure (*Official Journal*, 1934, pp. 222-223). These were approved by the Council on January 19, 1934. In April, 1935 the Committee held its second session and its report (C. 159. 1935. VI) was presented to the Council on May 22, 1935. The Committee's third (extraordinary) session was held at Geneva from April 15 to 24, 1936, and its report (C. 270. 1936. VI) came before the Council on July 4, 1936. Upon receipt of this report the Council expressed its hope that the 1926 Convention might be ratified and adhered to by States which had not yet done so. It also directed 'the attention of governments concerned, for any action they may think fit to take, to the resolutions and recommendations, both general and specific, which the Advisory Committee has thought expedient to formulate in its report'. The fourth (ordinary) session of the Committee was held from April 5 to 10, 1937, and its report (C. 238. 1937. VI) came before the Council on May 24, 1937. The fifth (extraordinary and last) session was held from March 31 to April 5, 1938 and its report (C. 112. M. 98. 1938. VI) presented to the Council on May 11, 1938. In accordance with the rules of procedure based on the Assembly resolution of October 12, 1932, the documentation examined by the Committee consisted exclusively of official information supplied by governments (*Official Journal*, 1938, p. 387).

According to the last report of the Committee slavery and the slave-trade were on the point of disappearing completely. Continuous progress was being made towards the solution of the problems which presented themselves in certain countries in connection with other institutions or customs resembling slavery in

greater or lesser degree. In the same report the Committee made a number of suggestions with a view to obtaining further light on points arising in the documents supplied by the governments and expressed the hope that the governments would continue to supply information as full and accurate as possible, in accordance with Article 7 of the 1926 Convention and the various Assembly resolutions.

By an Assembly resolution of September 25, 1926, laws and regulations circulated by governments through the Secretary-General of the League, by virtue of Article 7 of the Convention, together with any 'supplementary information' governments might furnish 'spontaneously', were to be made the subject of an annual report to the Secretary-General. This was reinforced by a further resolution on September 21, 1929, instructing the Secretary-General to collect from States parties to the Convention, both members and non-members of the League, 'all possible information on the present position of slavery'. There thus appeared regularly on the agenda of the League Assembly up to 1933 a special item in the following form; Slavery: (1) Annual Report by the Council; (2) Report by the Secretary-General.

From 1934 to 1938 the Advisory Committee of Experts on Slavery was the League's technical body to which the Secretary-General referred all data furnished by governments on the slave-trade, both in respect of mandated and all other territories. Its last report to the Council, just referred to, a document of 130 pages, shows how extensive was the information available to the League on conditions in all parts of the world (see Duncan Hall, *op. cit.*, p. 240).

The work of the League of Nations directed to the suppression of slavery is expounded in great detail in a memorandum of the Secretary-General of the United Nations dated January 23, 1950 (United Nations document E/AC.33/2). An appendix to this document gives a detailed and classified list of League of Nations documents on slavery and the slave trade.

THE PROCLAMATION AND ENFORCEMENT OF HUMAN RIGHTS

With the emergence of the United Nations during the Second World War, the way was opened for a more comprehensive attempt to stamp out slavery and slave-like institutions. The powers given to the various United Nations organs have placed in the hands of the international society means which, if efficiently used, could certainly bring the realisation of at least one of the most elementary human rights, a social and international order in which the observance of anti-slavery conventions will be enforced.

In the Charter the United Nations declared their determination to reaffirm faith in fundamental human rights and in the dignity and worth of the human person and laid down as one of the purposes of the United Nations the achievement of 'international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1, point 3). Slavery and its suppression are not specifically mentioned in the Charter, but it expresses the principles which, if firmly established, would make slavery and other institutions or customs resembling it impossible.

Responsibility for the realisation of human rights and fundamental freedoms is divided among the various United Nations Organs.

The General Assembly is charged (Article 13) with initiating studies and making recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Economic and Social Council (Article 62) may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedom for all; while the encouragement of respect for these rights and freedoms are listed among the basic obligations of the trusteeship system (Article 76 (c)).

By a resolution dated June 21, 1946, the Economic and Social Council established a Commission on Human Rights the function of which is to put proposals before the Council regarding, inter alia, an international bill of rights and any other matter concerning human rights. In pursuance of this Council resolution the Commission on Human Rights decided during its second session (Geneva, December, 1947) that it would aim at the preparation of an International Bill of Human Rights which should have three parts: (1) the Universal Declaration on Human Rights; (2) the Covenant on Human Rights; and (3) Measures for Implementation (Economic and Social Council Official Records, 3rd year, 2nd session, suppl. 1, p. 5).

The preamble to the Universal Declaration of Human Rights—approved by the General Assembly, December, 1948—states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world', that 'disregard and contempt for human rights have resulted in

barbarous acts which have outraged the conscience of mankind' and it reaffirms the pledges given in the Charter. It then proclaims the Declaration on Human Rights as a common standard of achievement for all peoples and all nations. It expects from everyone the effective observance of these rights.

Article 1 proclaims that 'all human beings are born free and equal in dignity and rights', thereby affirming in an international document ancient ideals proclaimed by philosophers, poets and statesmen. Article 2 proclaims that everyone is entitled to all the rights and freedoms set out in the Declaration without distinction of status, colour, etc. Consequently, 'Everyone has a right to recognition everywhere as a person before the law' (Article 6). In this connection it has to be emphasised that here, in Article 6 of the Universal Declaration on Human Rights in contradistinction to the definition of slavery in Article 1 of the 1926 Slavery Convention, the word 'person' is used in its technical sense.

The most important provisions against slavery are contained in Articles 4 and 5. Article 4 provides that 'No one shall be held in slavery or servitude; slavery and the slave-trade shall be prohibited in all their forms'. Article 5 stipulates that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. In addition, Article 13 proclaims for everyone 'the right to freedom of movement and residence within the borders of each State and the right to leave any country, including his own, and to return to his country'. Article 14 provides for a right to asylum from persecution, a right the grant of which should not be necessary, once the other postulates of the Declaration have materialised. Article 23 proclaims the right to free choice of employment and to just and favourable conditions of work, and to just and favourable remuneration ensuring for the employee and his family an existence worthy of human dignity, and Article 24 proclaims the right to leisure. Article 28 envisages that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised'.

At the date of publication, the Draft Covenant is still under discussion by the U.N. Commission on Human Rights, while Measures for Implementation are not yet in sight.

Prima facie it would appear that international law already recognises enslavement and other inhuman acts as international crimes.

The Tribunal established for the prosecution and punishment of major war criminals was empowered by its Charter annexed to the Four Power Agreement of August 8, 1945, to try and punish certain persons for crimes against peace, war crimes, and crimes against

humanity. In Article 6 (c) of this Charter (1 *Trial of Major War Criminals*, Nuremberg, 1947, pp. 10, 17, 22, *ibid.*, 414) the signatory powers established, inter alia, that enslavement, deportation, and other inhuman acts are punishable as crimes against humanity and in its judgment the International Tribunal maintained that the Charter was the expression of international law at the time of its creation, and to that extent itself a contribution to international law. Moreover, on December 11, 1946, the General Assembly of the United Nations affirmed the principles of international law recognised by the Charter of the International Tribunal and its judgment.

From the Protocol of October 6, 1945, regarding the wording of Article 6 (c) of the Tribunal Charter (1, *ibid.*, 17) it is, however, abundantly clear that the victorious powers did not wish to characterise as crimes against humanity any acts not committed in connection with war crimes or crimes against peace (cf. Egon Schwelb, *Crimes against Humanity*, B.Y.B.I.L. (1946), 178). Schwarzenberger observes that, 'the rather artificial limitation . . . of crimes against humanity and those connected with crimes against peace hardly commends itself as declaratory of international customary law. . . . Either criminal responsibility exists for all forms of the abuse of national sovereignty with regard to individuals such as . . . enslavement or deportation . . . or such behaviour is covered in peace-time by the conception of exclusively domestic jurisdiction' (1 *International Law*, London, 1949, p. 322).

The Protocol just referred to explains the position and shows the importance of a Covenant on Human Rights and measures for implementation. Measures for the suppression of slavery will ultimately form part of a wider framework designed for the enforcement of the observance of human rights and fundamental freedoms. The work of the United Nations in respect of suppression of slavery has been described in the opening chapter of this article. The provisional agenda of the Ad Hoc Committee on Slavery—the direct successor to the League's Advisory Committee of Experts, the work of which had come to an end on the outbreak of the Second World War—is contained in United Nations document E/AC.33/1 of November 30, 1949. This agenda was adopted at the first meeting of the Committee on February 13, 1950, and later an interim report submitted to the Economic and Social Council (United Nations document E/1617 of February 21, 1950). The importance of the work to be done by the Ad Hoc Committee and other United Nations organisations can hardly be over-rated. With so many clouds on the political horizon, this problem should not be lost sight of. Even at this early stage there is evidence before the Ad Hoc

Committee which more than justifies the activities of the United Nations in this field. A comprehensive survey of slave-like conditions in Latin America has been submitted by the Chairman of the Ad Hoc Committee, Professor Moises Poblete Troncoso, of Chile (United Nations document E/AC.33/6 of February 16, 1950. See also U.N. document E/AC.33/7 of February 14, 1950). The Secretary-General has submitted a report on slave-like conditions in non-self-governing and trust territories (U.N. document E/AC.33/8 of February 16, 1950) and further evidence can be expected from replies to a questionnaire to be sent to the various governments. (Annex II of U.N. document E/1617 of February 21, 1950.)

We have to aim higher than at a mere ratification of a convention or the framing and enactment of municipal laws. They are indispensable, but not enough. Without effective enforcement measures against slave-raiders, traders, holders, and similar criminals and effective help for their victims the high principles proclaimed in the United Nations Charter and affirmed in the Universal Declaration of Human Rights will remain unfulfilled.

CONCLUSIONS

It is beyond the scope of the present inquiry to make suggestions with regard either to the means to be adopted for the suppression of slavery and similar obnoxious practices or their definition. With regard to the means it may be emphasised that the slave-trade at sea is still not piratical and the right to visit, search, and confiscation which under earlier conventions proved to be a strong remedy, would require a comprehensive treaty.

The extension of criminal responsibility to early stages of dealing in slaves—*e.g.*, conspiracy—might be considered.

Without proposing any new definition, certain characteristics of slavery and allied institutions may be suggested.

The 1926 General Convention stresses the existence of property rights in a natural person as characteristic of slavery. Should, however, the framers of a definition include also the evil consequences that threaten or befall a victim of slavery or similar institutions who tries to realise his or her natural right to freedom, such characterisation would then also cover the condition of subordinates in whose status the conception of their being owned as property is blurred or entirely absent.

Certain bargains which put a party into a slave-like condition—sometimes called peonage (see *e.g.*, *League of Nations Official Journal*, July 1936, p. 808, or the 1919 Constitution of Tabasco, reproduced in the 1947 *Yearbook on Human Rights*, p. 233)—appear to fall within the definition of 'hard bargains' as understood in

Equity or of usurious contracts, well known in Turkish law and the Codes of several European countries as, *e.g.*, Switzerland or Czechoslovakia. The incorporation of these equitable and legal doctrines into a definition of slave-like conditions might be considered.

Recently in the House of Lords Lord Atkin had the opportunity of suggesting a definition of serfdom when he had to determine the assignability of a contract of service. In *Nokes v. Doncaster Collieries, Ltd.* [1940] A.C. 1014, where a company to which all the assets of another company had been transferred, claimed unsuccessfully that the contracts of service had also been transferred, Lord Atkin said (at p. 1026) : ' I confess it appears to me astonishing that . . . powers should be given to . . . anyone . . . to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve : and that this right of choice constituted the main difference between a servant and a serf '.

An interesting case where a moneylender tried to put his victim into a serf-like condition came before the Court of Appeal in 1917 : this was *Horwood v. Miller's Timber and Trading Co., Ltd.* [1917] 1 K.B. 305, where the plaintiff moneylender had covenanted with the employee of the defendants that in consideration of the plaintiff paying the employee's debts, the latter would, apart from repaying the loan in instalments, assign to the plaintiff his salary due from the defendants and would not (*inter alia*) remove from his then dwelling-house. The plaintiff alleging breaches of the covenant gave notice of the assignment to the defendants who, however, continued paying the wages to their employee. It was held that the contract between the moneylender and the defendant's employee was against public policy. Lord Cozens-Hardy M.R. observed (at p. 311) : ' It is no answer to say that an adult man, as to whom undue pressure is not shown to have been exercised, ought to be allowed to enter into any contract he thinks fit affecting his own liberty of action. . . . It seems to me that if . . . I come to the conclusion that the contract is one which puts the covenantor in the position . . . of *adscriptus glebæ*, as the villein used to be called in mediæval times, on the ground of public policy the law will not recognise such a thing. No one has the right to deal with a man's liberty of action as well as his property . . . ' (and at p. 312) : ' Possibly slavery is too strong a word, but it certainly seems to me to savour of serfdom . . . '.

Provisions against the perpetuity of a contract of services can be found, *e.g.*, in the Code Civil which provides in Article 1780

that a person can only bind himself to give his services for a certain time or for a special enterprise. It is further provided that the hiring of services made without a fixed duration can always cease at the will of one of the contracting parties. In the Swiss Law of Obligations, Article 351, it is provided that if service is agreed upon for the life of a person or for more than ten years, the employee may terminate it upon the expiration of ten years without compensation by giving six months notice.

The corresponding provisions of the German Civil Code (§ 624) and the Japanese Civil Code (§ 626) provide for the same right to be exercised after five instead of after ten years.

Several European codes provide for the voidability of unconscionable bargains, even if they do not tend to perpetuity. Similar ideas underlie the English Moneylenders Acts and U.S. state laws against usury. The jurisprudence of most continental codes adopts an attitude similar to that of Equity to hard bargains, save that they do not confine themselves, as Equity does, to the protection of persons giving up property or, as the Moneylenders Acts do, to undertakings to repay a loan. Article 21 of the Swiss Federal Code of Obligations and the Turkish Code of Obligations provide that in the case of an evident disproportion in the relative considerations passing between the contracting parties due to one party taking advantage of the distress, the inexperience or the improvidence of the other party, the prejudiced party may within one year rescind the contract and demand restitution of the consideration already given. The period of one year commences with the entering into the contract. Similar provisions appear in the Austrian Imperial Ordinance of October 12, 1914, R.G.Bl. 275, which apart from incorporating penal sanctions (§§ 2 and 4) provides (§ 1) that a contract is void where the first party in making it takes advantage of the improvidence, distress, mental weakness, inexperience or emotion of the other party who promises or actually gives to the first or a third party a consideration the pecuniary value of which is in gross disproportion to the other consideration.

The principles of these provisions have found their way into several European codes. The characteristics of such contracts are, (1) the usurer accepts consideration or the promise thereof. Any contract can be usurious in this wider sense. The kind of consideration given or promised by the usurer is immaterial: leases or contracts of service are covered. (2) There must be evident disproportion between the monetary values of both considerations. It is immaterial that the consideration given or promised to the prejudiced party has high value to him in his particular circumstances. (3) There must be at least one of the following five conditions

present in the prejudiced party and be known to the usurer: (a) improvidence, *i.e.*, unconcern for future distress; (b) distress, by which is meant not only the existence of economic pressure, but also danger to life, etc. It is immaterial whether this is the victim's or a third person's condition giving rise to the transaction; (c) mental weakness which covers a wider field than imbecility; (d) inexperience; (e) emotion or excitement. It is immaterial why the victim was alarmed or upset. It may be the consequence of alcohol, the consequence of his condition mentioned under (b), etc. (Cf. Ehrenzweig, 2 *System*, Vienna, 1928, p. 171.)

Ehrenzweig (*op. cit.*, p. 174) postulates in such case not mere nullity or voidability of the transaction. If the contract is entirely avoided, the prejudiced party is thrown back into the distress from which he expected the usurious contract to save him. The law should give him the right to ask for a reduction of the disproportionate consideration.

Spanish and Portuguese laws do not appear to have incorporated the provisions of *læsio enormis* accepted by the jurisprudence of the countries mentioned (cf. 6 *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, Berlin, 1938 781).

The application of criminal sanctions and the provisions of *læsio enormis* to usurious labour contracts would give the law the power to set aside such contracts, and apart from holding him criminally responsible make the employer pay to the worker for his past labour the market value of such labour.

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SUBSIDIARY JUDICIAL AUTHORITIES OF THE UNITED NATIONS ORGANIZATION TO HEAR AND DECIDE CLAIMS BY INDIVIDUALS AND CORPORATIONS AGAINST STATES.

THE purpose of this paper is :

- (a) to consider some of the reasons which have led lawyers to propose that subsidiary judicial authorities should be established under the United Nations Organization to hear and decide claims by individuals and corporations against States, and that the jurisdiction of those judicial authorities should extend to questions arising from nationalization and confiscation of property and also to commercial and other disputes between individuals of different nationalities.
- (b) To show that these proposals are premature, and
- (c) To suggest that the International Court of Justice at the Hague can, and should, be invited to deal with such of these matters as are properly within the scope of international law, or to which international law, when codified, might justifiably be applied.

1. *Reasons for the proposal.*

National and international events in the last twelve years have resulted in very great numbers of cases in which individuals have suffered injustice either to their persons or their property in many parts of the world, and, as that injustice has frequently arisen in the administration of policies which have been pursued by sovereign States in their legislation, the individual finds no relief under the municipal law of the sovereign States concerned. When the claimant is a national of another sovereign State, only political and diplomatic channels and international tribunals can offer him relief.

Nationalization might be described as a general, impersonal, taking of the economic structure in a State, in full or in part, for the nation's benefit, with or without compensation, and it is from nationalization, and from confiscation of property, that a large proportion of the present problems arise. They are extremely intricate problems because there are several kinds of conflicts of interest occurring at the same time. There is the conflict between the individual, or the corporate owner, whose property,

and perhaps the means whereby he lives, is being taken away, and the State which is expropriating the property; the conflict between one State and another as to the terms of compensation which ought to be given by the nationalizing State; and, underlying both of them, the conflict of 'ideologies', that is, the conflict between those who say that the State should own and operate 'the means of production, distribution, and exchange' and those who say that the private individual or corporation can and does organize business, trade, and property more efficiently than the State, and should be allowed to continue to do so without unnecessary State interference. Superimposed upon these difficulties are the facts, first that money alone cannot always be adequate compensation when a means of livelihood is taken away, and second that in many States the financial economy cannot by any possibility pay the amount of money that would be required: most governments do not offer 'effective, prompt and adequate compensation' but merely compensation in the form of long-term obligations or bonds of the State itself. In international law the right of a sovereign State to nationalize property within its territory is not disputed, but, as the United States Government put this question in a Note of April 3, 1940, to the Mexican Government, 'the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation' and that '*the legality of the expropriation is in fact dependent on the observance of this requirement*'.

There is authority in international law for the view that foreign nationals are entitled to an international *minimum* standard of equitable compensation.¹ Equality of treatment of nationals and non-nationals is rarely satisfactory to the foreign claimant. Post-war nationalization is, indeed, a political evolution so widespread and so far reaching in its effects that the relevant legal concepts of international law require reconsideration, perhaps by the International Court of Justice itself.

Lawyers turn to judicial authorities for the solution of these problems for, as they point out, when diplomatic representations

¹ Fachiri: 'Expropriation and International Law', 6 *British Year Book of International Law*, pp. 159-160 (1925).

Kackeenbeck: 'The Protection of Vested Rights in International Law', 17 *British Year Book of International Law*, pp. 1, 16 (1936).

It is interesting to note that in the French legislation upon the nationalization of French gas and electricity industries Article 13 of the law of April 8, 1946, provides that 'the interests of the shareholders of foreign nationality will be regulated by an order signed by the Ministers of Industrial Production, Foreign Affairs and Finance'. The French Parliamentary debates indicate that the French Government did not wish to incur international liability by violating rights of foreigners and rules of international law; it may therefore be willing to pay more compensation to foreigners than to its own nationals.

are made, based upon international law and practice, an intense insistence upon sovereign rights has been used, and misused, by governments in order to avoid the consequences of their own breaches of international law or of the code of conduct of civilized nations. The level of civilization in a State may, indeed, be measured by the treatment accorded by that State to the individuals within its territory, and, in a period when that level is falling it is hardly surprising that international law, which is itself dependent upon civilized behaviour among nations, has encountered serious difficulties. It should not be forgotten, however, that it is the application of international law through the machinery of diplomacy which has secured compensation in municipal law for foreign nationals when their property in foreign States was nationalized. Many such agreements have been concluded between governments providing for the payment of compensation, which, though it may not be 'adequate, effective, and prompt', is a great deal more satisfactory than the measure of compensation which would otherwise have been provided by the municipal law of the State carrying out the nationalization. These agreements, and many others affecting the rights and interests of foreigners in movable and immovable property, were concluded without the submission of any questions to a court, and may be regarded as examples leading us to the conclusion that settlement 'out of court' is often a desirable objective in other fields as well as in the practice of a lawyer's profession under municipal law.

None the less, lawyers say that international judicial authorities should be established to deal with these matters, implying thereby that the decision of such a court or authority is, or could be made to be, binding upon the States concerned, and that the result of the judgment would be more satisfactory to the plaintiff claimant and to the defendant State than that arrived at as a result of international agreement or of diplomatic representations.

Further, they say that in commercial and other disputes between *individuals* of different nationalities, the arrangements at present existing for such litigation, under the municipal laws of various States, are so variable, so inadequate, and subject to such administrative difficulties including those of obtaining and adducing evidence, establishing the law which shall be applied, and in enforcing a judgment when it has been obtained, that the result of such litigation is rarely satisfactory. There is, in the writer's opinion, much force in the proposal that international judicial authorities or courts should be established and given jurisdiction to deal with disputes between *individuals of different nationalities*, but there are many difficulties which would face the individual

litigants; the expense of such proceedings, and the necessity that sovereign States should agree to enforce the judgments under their own municipal law, being among them.²

2. *These proposals are premature.*

It is submitted that under present circumstances these proposals, in so far as they contemplate litigation directly between *individuals and States*, are premature, for the following reasons:—

Fundamental changes would need to be made in international law itself. In the opinion of the majority of international jurists, neither individuals nor corporations are normally regarded as legal persons enjoying direct rights under international law. The legal personality of individuals and corporations under municipal law is a *fact* of which international law takes account, but the individual and the corporation have not, as such, any rights against a State in international law. It is true that in certain peace treaties³ and in international agreements, individuals and corporations are given rights against States, but this is because the States concerned are parties to the treaties or agreements and they have accepted that liability. It is not, therefore, an exception to the general rule referred to above. International law, as it stands at present, cannot grant rights to individuals, but as it is superior to municipal law⁴ one result of its application brings the force of international opinion to bear on States and, as a result of that pressure, rights may be given to individuals or corporations in the *municipal* law of individual States.

But unless a fundamental change is to be made in international law so as to give individuals rights under international law, or a great change of political purpose is achieved in many States in Central and Eastern Europe, the establishment of judicial authorities for the purposes mentioned at the beginning of this paper will

² The Foreign Judgments (Reciprocal Enforcement) Act, 1933, is an example in the legislation of the United Kingdom which might be extended to provide for the enforcement of judgments of international judicial authorities, if they were established. Under that Act, foreign judgments which are final and conclusive and which adjudge a sum of money to be payable to the applicant, other than in respect of taxes or a fine or penalty, can by registration here be enforced in the United Kingdom and in other parts of the British Commonwealth, and the Act has corresponding counterparts in the municipal legislation of other States which thereby give reciprocity of treatment to judgments obtained in the United Kingdom.

³ Treaties of Peace with Italy	Article 78	} Cmd. 7022.
Roumania	" 24	
Bulgaria	" 23	
Hungary	" 26	
Finland	" 25	

⁴ See 'Norwegian Ships Arbitration': 17 *American Journal of International Law* 362 (1923). Also Permanent Court of International Justice, Series B, No. 17, p. 32 (1930). Also Permanent Court of International Justice, Series A, No. 24, p. 12.

be premature, as those subsidiary judicial authorities, whether they are courts or arbitration tribunals, will find that the claimants have no rights in municipal law, and no direct rights in international law. Agreement has not yet been reached in the United Nations defining *what is the relevant international law* in its application to the completely new problems which now exist.

It is suggested, therefore, that attention should first be concentrated upon the adoption by the General Assembly of the United Nations, of the rules of international law, codified as provided by Article 13 (1) (a) of the Charter of the United Nations. In view of the very considerable difficulties which have been experienced in the past⁵ in arriving at a generally agreed statement of what the international law *is* upon various legal issues, there seems to be no prospect of obtaining early agreement in a new vast field of conflicting views concerned with the respective interests of States and individuals in property, obstructed as that field now is by politically opposed groups of States. It is a matter of agreement, and lawyers will realise how difficult it is to achieve any general international agreement in the present condition of Europe, for it seems necessary first to agree upon what the international law *is* upon any particular matter, and then further to agree upon *what it ought to be* in the light of recent developments, and how the change shall be made enforceable. It is difficult, but it is not impossible.

There remains also the possibility that, just as Regional Arrangements are authorized under Article 52 of the Charter of the United Nations 'for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action', so also, in the legal field, agreement upon international law and upon the establishment of subsidiary judicial authorities within certain regions, may be practicable and desirable in the future.

When the law to be applied has been clearly stated by the International Court of Justice, or has been codified, the institution of subsidiary judicial authorities with jurisdiction to decide claims by private persons, institutions and corporations against States, and disputes between persons of different nationalities will, perhaps, become practicable. The conditions which would, it is suggested, need to be satisfied before such a system of organized and dispersed international jurisdiction could operate successfully, include :—

- (a) Voluntary submission by States to the jurisdiction of the subsidiary judicial authorities, and an acceptance by the

⁵ Similar difficulties arose when the League of Nations inquired into this question. See League of Nations Documents 37 (C.75, M.69.1929). See also Cmd. 3452 (1929), pp. 7 and 8.

parties to such litigation or arbitration of some system of enforcement of judgments of decisions of those authorities. This carries with it the implication that appropriate municipal legislation would be enacted in every State accepting the jurisdiction of the subsidiary authorities, to enforce their decisions within its territory.

- (b) A State of social safety far greater than that which now exists; that is, freedom of individuals to move across frontiers to reach the courts without political interference. There might, for example, be such courts in Europe, in Asia, and on the South American Continent, but the expense to the parties and witnesses and lawyers concerned in reaching the appropriate court is an obvious and serious difficulty; it is unlikely that a State would pay the expenses of an opposed party, and, if it would not, who else will do so? There are, of course, other purely practical difficulties which will occur to practising lawyers.
- (c) It should be remembered also that a plaintiff in such proceedings would frequently reside and carry on his profession, trade or business in a State which was itself a defendant in the proceedings. In an ideal state of civilization no discomfort would arise, but in Central and Eastern Europe today the plaintiff and perhaps his relations also and the directors of a corporation, if the plaintiff is incorporated, would not be allowed to remain fully at liberty. In a number of States the individual national or corporation is not permitted *in any way* to oppose the State, and any such opposition in litigation is impracticable even if it is, theoretically, possible.

Lawyers discussing these international legal questions may wish also to consider the position of their colleagues in certain European States where professional freedom is now reduced almost to a farce, and where lawyers are unwilling to act for clients residing in Western Europe or who are nationals of some other foreign States because they fear, and they have, unfortunately, good reason to fear, the political and physical consequences even of representing such clients in municipal legal proceedings. Under those conditions it may well be found as a matter of existing international law, that the municipal remedies theoretically open to a foreign national are in fact no longer available; and if that be so, then diplomatic intervention and the application of international law between States are the only remedies left for the ultimate satisfaction of the foreign national.

In the writer's view, therefore, these proposals which involve

a complete change of the structure of international law, are premature. But there *is* a way in which these matters can *now* be brought before a Court.

All members of the United Nations are parties to the Statute of the International Court of Justice which has jurisdiction to hear all cases which are referred to it by States. Only States may be parties to cases before the Court. The cases which may be brought by a State, may, however, include those arising from wrongs which the State complaining of them has sustained in the person of its nationals.⁶ While, therefore, a State may inflict various kinds of injury and misfortune upon the property or persons of its own nationals without giving compensation, confiscation or nationalization of the property of *foreign* nationals or wrongful treatment of foreign nationals within its territories may lead, ultimately, to a case being brought before the International Court at the Hague. It is true that under International Law the individual or the corporation must first exhaust municipal remedies, but in the majority of cases where nationalization is concerned, there is no appeal against the provisions of a Statute nationalizing a property of an individual or of a company. The issue which could frequently be raised is as to the measure of compensation, and whether or not it is adequate, and whether or not the payment proposed is prompt or effective.

It may also be noted that once a case is sponsored by a State, and diplomatic representations are made to another State about it, the individual ceases to be a party in the case and it is from that time onwards a matter *only between States*, and therefore can lead to an early reference to the International Court if both States concerned agree to such a reference, or if both of the States concerned have made declarations under Article 36 of the Statute, agreeing to accept the jurisdiction of the Court. A considerable number of these declarations have been made and although they vary in their scope and in the period of time which they cover, it is clear that reciprocal agreement to submit disputes to the International Court of Justice is already a legal and a practical reality. It might not be so if the question were one of submission to a variety of subsidiary judicial authorities.

The legal machinery is already established; it is for States to make use of it and to bring a much greater number of cases before the court, including those arising from breaches of International Law connected with property.

E. A. S. BROOKS.⁷

⁶ *Mavromatis Case*. Publications of the Permanent Court of International Justice, Series A, No. 2, p. 12.

⁷ M.A. (oxon), Solicitor, London.

GERMAN ENEMY PROPERTY—II

(Continued from p. 407 ante)

VII

The requirement of enemy character of the holder appears in the text of the law in the form of a list. This list is similar to, but by no means identical with, the list of persons defined as 'enemies' in section 2 of the Trading with the Enemy Act.

1. The first to appear in this list is 'the German State'. The use of the singular in this phrase is certainly surprising. It may be assumed that the draftsman was aware of the fact that the various German Länder—both those existing before 1945 and those formed since then—are not sovereign. For this reason he may have been unwilling to refer to them as 'States', although, of course, there are many examples of non-sovereign States. If the German Länder are not included in this first item, it would hardly appear to matter, because the fourth item in the list refers to bodies of persons incorporated in, or under the laws of, Germany. The German Länder would, therefore, appear to be clearly included in the list, *i.e.*, either in the first or in the fourth item. But the German Länder are not the only territorial units formed on German territories. Until the collapse of the National Socialist régime, there existed, of course, the Reich. Since then we have on the same territory no less than three territorial units, all of which are undoubtedly States, *i.e.*, the German Federal Republic whose capital is Bonn, the Eastern German Democratic Republic whose capital is in the Soviet sector of Berlin, and the Saar district with its capital in Saarbrücken. Does the use of the singular 'the German State' mean that none of these three territorial units is included here? There is no need in this connection to consider the question whether one of these three units is the successor of the German Reich. Nor does the question of the recognition of the existence of either of them or of their respective governments enter the picture. It is submitted that these are questions of international law which can safely be left aside in interpreting a rule of English municipal law. For the purpose of interpreting the present clause it would appear to be safe to assume that the law is intended to cover any *de facto* autonomous territorial unit formed on the territory of Germany as defined in the

text. Presumably the draftsman did not wish to prejudge the question whether one or several such units did in fact exist on that territory. This may explain the use of the singular in the text. This, however, would not appear to exclude the possibility of applying the rule to the several units now in fact existing there. Needless to say, the question of recognition and that of State succession may play their important part in connection with property in this country which once belonged to the Reich. Thus the power of the Board of Trade to direct the Custodian to release property to the original owner or its lawful successor (section 1 (6)) is, in the case of former Reich property, confined to making directions in favour of a State which is recognised by H.M. Government, and which is a lawful successor of the Reich. But this question is outside the sphere of section 8 and for the present purpose it would appear to be safe to assume that property of the Federal German Republic, the German Democratic Republic or of the Saarland is alike covered by the term 'German State'.

2. The second type of persons on the list is described as:

any individual who on the said third day of September nineteen hundred and thirty-nine, or at any time thereafter, was a German national resident in Germany or in any territory under the sovereignty of a State which on or at any time after the said day was at war with His Majesty.

This provision differs in a surprising manner from the corresponding provision of the Accounting Rules. Under these only those assets must always be included in the charge which on January 24, 1946, were owned directly or indirectly by any individual who had German nationality on January 24, 1946, and who on that date was physically inside Germany or had his residence in Germany. A further provision adds, however, assets which were on January 24, 1946, owned directly or indirectly by any individual who had German nationality at any time between the date on which the country of the Signatory Power was occupied, annexed by, or entered into war against, Germany and January 24, 1946, provided that they have been seized, have not been released and are not intended to be released. One may therefore distinguish under the Rules of Accounting two types of assets belonging to German individuals: those which must be charged to Reparation Account and those which must be charged only if they are treated by the Member State as a German asset. The remarkable fact is that under the British Act some assets are treated as German enemy property which are not German assets under the Rules of Accounting and, vice versa, that assets are treated as German assets under the Rules of Accounting which are not German enemy property under the Act.

I shall make no attempt here to enumerate exhaustively the cases in which this divergence between the rules and the Act becomes apparent, but may confine myself to giving examples of both types of cases. Under the Act property of a person who became a German national resident in Germany during the year 1949 would be German enemy property. This is possibly of considerable importance, because the basic law of the German Federal Republic contains a provision by which a very large number of persons now residing in Germany have acquired German nationality in 1949. Under the Rules of Accounting the property of a person who after January 24, 1946, acquires German nationality is not considered as a German asset. The case of persons in this category constitutes therefore an example of property which is German enemy property under the Act but not a German asset under the Rules of Accounting. On the other hand, under the rules, the property of any person possessing German nationality on January 24, 1946, and on that date physically in Germany is a German asset. Thus, to give an example, the property of a German refugee from Nazism serving in the British Army of Occupation, and stationed in, say, Cologne, is a German asset which must be charged against reparations. Under the Act the property of this person would not be German enemy property because, although physically inside Germany on that date, he was not resident there. No doubt, the differences between the Act and the rules will result in a number of knotty problems of accounting, which may only partly be eliminated by a release granted under the discretionary powers of the administrator in those cases in which property is German enemy property under the Act, but not a German asset under the rules.

(a) Quite apart, however, from these considerations which, of course, do not directly affect the interpretation of the Act, although they may strongly influence administrative practice in connection with it, the Act will provide a number of complex problems in connection of the conception of 'German national'. Some, but by no means all, of these problems have been referred to by way of special provisions, which it is necessary to deal with in the first instance. The first of these provisions was included into the Bill in the committee stage of the House of Commons and reads as follows :

“ ‘German national’ does not include any person who acquired German nationality by reason of the inclusion in the German State after the first day of March, 1948, of any territory not comprised therein on that day.’ ”

This section was obviously intended to exempt from the treatment under the Act the property of any inhabitants of conquered territories who were made German nationals against their own will. The wording of the section cannot, however, be considered as the most fortunate expression of this legislative intention.

The most natural meaning which one could give to the words employed in the text of the law would be that it applies only in those cases in which German nationality was bestowed upon the inhabitants of the territories in question by the mere inclusion of their territory into the Reich. If one were to interpret the section in this manner, it would be incapable of being applied at all: in no case was the mere inclusion of any territory into Germany an effective ground for the acquisition of German nationality by its inhabitants. In all cases the inclusion of the territory was followed by the enactment of special German laws which dealt with the question of the nationality of the inhabitants of the conquered or incorporated territories.²⁷ The reason of the acquisition was therefore the enactment of these laws and not the inclusion of the territory. In order to give to the subsection a reasonable meaning it is therefore necessary to depart from the literal sense of the words. Cases in which the inclusion of territory was followed by the enactment of laws granting German nationality to all but a number of inhabitants in exceptional positions must be included in the sphere of application of the subsection. The exemption would thus appear to apply to all persons who acquired German nationality in consequence of the mere enactment of laws passed after the inclusion into Germany of the territory inhabited by them. This interpretation would bring within the orbit of the application of the subsection the inhabitants of Austria, Eupen-Malmédy and Moresnet, the Sudetenland and the Memelland, because in these territories German nationality was granted to the bulk of the inhabitants and persons entitled to reside there.²⁸

However, in a number of other cases the German conquerors resorted to more selective methods of granting German nationality. Thus in the central parts of Czechoslovakia—which formed the

²⁷ A convenient reprint of these provisions with a useful commentary will be found in Rasche, *Deutsches Staatsangehörigkeitsrecht* (Münster, i.W., 1948), pp. 50 ff. For a brief summary see Palandt, *Bürgerliches, Gesetzbuch*, 6th ed. (1944), pp. 1884 *et seq.* The later editions of this work do not contain this summary. 'Incorporated Eastern Territories' as referred to in the text are the districts of Danzig, Marienwerder, Bromberg, Hohensalza, Posen, Lodzs, Kattowitz, Zichenau and Suwalki, see Stuckart-Schiedermair, *Neues, Staatsrecht*, Vol. 2, 18th ed. (1943), p. 72 f.

²⁸ See for a list of these laws Rasche, *l.c.*, pp. 109 ff.

so-called Protectorate Bohemia and Moravia, and was as such included into the German Reich—in Lower Styria, Carinthia, Carniola and the districts on the German-Polish border which were incorporated into the Reich as, *e.g.*, Upper Silesia, the Germans enacted legislation providing that only those inhabitants should acquire German nationality who were of German extraction (*deutsche Volkszugehörigkeit*).²⁹ Can it be said that the persons in question cannot benefit from the subsection because they acquired German nationality by reason of their German extraction, and not by reason of the inclusion of their territory into the Reich? It is submitted that the subsection must be applied in cases of this character, because the German extraction—a term which the German administration found it very difficult to administer in the complex circumstances of typical borderlands³⁰—was perfectly irrelevant in regard to nationality until the inclusion of the territory into Germany and the enactment of the new nationality laws. The section must apply to all cases where German legislation attached to a pre-existing fact or circumstance relevance in respect of the acquisition of German nationality. It is, however, believed that it is necessary to go further. A woman who was not of 'German extraction' and who had consequently not acquired German nationality, and who during the period of occupation married a person who was of German extraction, thereby acquired German nationality.³¹ It would clearly appear to be fair to allow her to share with her husband the benefit of the exception.

Acquisition of German nationality in consequence of naturalisation during the period of the occupation will, however, probably not be considered to be acquisition by reason of the inclusion of territory into Germany, even though in some cases the naturalisation may have been due to pressure or to the prevailing circumstances in general. In such cases only an equitable exercise of the Administrator's powers to grant relief can help, though this

²⁹ Ordinance on the Protectorate Bohemia and Moravia of March 16, 1939 (*Reichsgesetzblatt* I, p. 485), Ordinance on the acquisition of German nationality by former Czechoslovak nationals of German extraction (*Reichsgesetzblatt* I, p. 815), Ordinance on questions of nationality with respect to the Protectorate Bohemia and Moravia (*Reichsgesetzblatt* I, p. 308), Ordinance on the Structure and Administration of the Eastern Territories of October 8, 1939 (*Reichsgesetzblatt* I, p. 2042), Ordinance on the German People's List and the German nationality in the Incorporated Eastern Territories of March 4, 1941 (*RGBl.* I, p. 118) as amended (see *Reichsgesetzblatt*, 1942, I, p. 51), Ordinance on the Acquisition of nationality in the liberated territories of Lower Styria, Carinthia and Carniola of October 14, 1941 (*RGBl.* I, p. 649).

³⁰ See the Ordinance of the Minister of the Interior of March 29, 1939 (*Ministerialblatt für Innere Verwaltung*, p. 783).

³¹ See Rasche, *l.c.*, pp. 109 ff.

may create difficulties as there is no corresponding rule permitting release in such cases in the Brussels Rules of Accounting.³²

Resettlers from the Baltic countries and elsewhere could acquire German nationality only by way of naturalisation.³³ As their territory was never incorporated into Germany the question of applying the sub-paragraph in their case does not arise. Similar considerations apply to the 'folk-Germans' from Central Poland. More complicated is the position in regard to Alsace Lorraine and Luxembourg.³⁴ By an Ordinance of August 23, 1942, inhabitants of German extraction in these districts acquired German nationality if they were called up to the German armed forces or to the armoured SS units or if they were recognised as well-merited Germans by the German civil administration. The first of these categories would seem to have acquired German nationality by an act of the administration which was not due to any initiative of their own. It may, in fact, in many cases have been much against their own wish. It would appear to be desirable that by way of an extensive interpretation, which would seem to be possible, the sub-section should be applied in their favour. The second category must obviously be looked upon in a different light and the same would clearly apply to those foreigners who acquired German nationality by volunteering for the German forces. The position of those who acquired German nationality under the Ordinance of the 'Führer' of May 19, 1943,³⁵ simply by being of German extraction and serving in certain German formations is, however, different. It will presumably be necessary to consider in every case how they came to serve in these formations; especially whether this service was the direct and inescapable consequence of the inclusion of any territory into Germany.

A very far-reaching provision is contained in Article 116 of the

³² It is necessary to distinguish between the rules of German law conferring German nationality, and those rules which merely relate to the proof of the acquisition of nationality. In a number of territories German associations had been formed to which a considerable number of German residents belonged. After the incorporation of these territories in the Reich the Minister of the Interior, when faced with the difficult problem of deciding who was to be considered as a resident of German descent, stated in a directive that holders of membership cards of these associations as, *e.g.*, the 'Kärntner Volksbund' were to be considered as of German descent and that the possession of the membership card was to be treated as equal to the possession of a certificate of German nationality. This does not mean that the act of becoming a member of one of these associations can be considered to have been either a legal requirement of the acquisition of German nationality, or otherwise as a step which facilitated this acquisition. It was merely an act which facilitated proof of such acquisition which followed automatically from the fact of German descent.

³³ See Rasche, *l.c.*, pp. 109 ff.

³⁴ Ordinance of August 23, 1942 (*Reichsgesetzblatt* I, p. 533).

³⁵ *Reichsgesetzblatt* I, p. 315.

Basic Law of the German Federal Republic. This rule provides that anybody who has found reception on the territory of Germany as refugee or expellee of German stock since December 31, 1937, automatically acquires thereby German nationality. That the persons who have become Germans in consequence of this rule are not able to benefit from the exception discussed before will be clear, because in connection with this rule the incorporation of foreign territory into Germany is of no importance. It may, however, be asked whether the persons in question—although under the law of the German Federal Republic they have acquired German nationality—can be considered as German nationals within the meaning of the Act. There is no doubt that this question must be answered in the affirmative in regard to those persons who were actually present on the territory of the German Federal Republic on the date when the Basic Law came into operation. But the provision is not confined to persons of this description. It applies to anybody who in the circumstances described found reception on German soil, even though he was no longer in Germany at the time when the Basic Law was passed. Some, at least, of the persons in question may for long be settled outside Germany. Many of them may have no wish whatsoever to acquire German nationality and some of them may never have had that wish. A fairly widespread view among international lawyers is that a State cannot effectively grant its nationality to persons living outside its territory, except in cases where one of the generally recognised points of contact, such as descent from a father possessing the nationality in question, birth within the territory, is present.³⁶ The fact that somebody is expelled for certain reasons from his homeland and has found temporary shelter in another country, does not, of course, constitute one of these generally recognised points of contact. Assuming a Baltic German possessing Lithuanian nationality, was expelled from Lithuania in 1939, found refuge in Germany for two months in that year and left in the beginning of 1940 for the Argentine, could the German Federal Republic in 1949—some nine years after the person in question had left Germany—still effectively grant German nationality to such a person? It is submitted that the answer must, in the case of persons who were not present in Germany when the Basic Law was passed, be in the negative. But it would seem to be desirable that even the property of persons who were resident

³⁶ See Oppenheim-Lauterpacht, *International Law*, 7th ed. (1948), Vol. 1, pp. 586 ff.; Guggenheim, *Lehrbuch des Völkerrechts*, Vol. 1 (1947), p. 27, note 15, and Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (1947), pp. 68 ff.

in Germany on that day should not be included in the conception of German enemy property. Property of persons who acquired German nationality after January 24, 1946, is not included in the conception of German assets as defined in the Brussels Rules of Accounting. It is therefore not chargeable on Reparation account. The Basic Law was passed with the consent of the British Military Government in Germany. It does not seem appropriate that the property of a person who was not in law an enemy should be treated as enemy property solely on the ground of a provision contained in this law.

The Basic Law provides also that persons who on racial or political grounds were deprived of their German nationality after January 31, 1933, and who have returned to Germany are thereby automatically regranted German nationality. Persons of this type are also granted the right to re-acquire German nationality by making a declaration to this effect, even if they do not return to Germany. To the extent to which such persons were at any time since September 3, 1939, resident in the United Kingdom, they would appear to be protected by a general licence of March 11, 1946, which exempted their property from Custodian control.³⁷ But it would hardly seem equitable that there should be a difference between those persons who have found a refuge from Nazi persecution in this country and those who found it in the U.S.A. or in the territory of any other Allied or neutral country. The principle that acquisition of German nationality by virtue of any provision contained in the Basic Law which was enacted more than four years after the termination of hostilities cannot make a person an enemy, would appear to be equitable. Unfortunately the adoption of this principle goes beyond the scope of interpretation. But the powers of the administrator to exempt property from treatment under the Act should be used in order to prevent from treatment as German enemy property the property of anybody who re-acquired his German nationality solely by virtue of any provision in the Basic Law or of any other law passed in Germany since May 8, 1945.

This would appear to be all the more desirable, as circumstances may place persons who acquired German nationality, by virtue of any provision contained in the Basic Law, at a disadvantage compared to persons who acquired German nationality in consequence of a similar law which might be passed by the Legislature of the Eastern German Democratic Republic. This State may possibly not be recognised either *de iure* or *de facto* by H.M. Government. In this case it would follow that a person who acquired German

³⁷ S. R. & O., 1946 (No. 331).

nationality by virtue of any law or administrative act of an agency of the German Democratic Republic would not be considered as a German national within the meaning of the Act.³⁸ This would not seem to be a desirable consequence.

The position in regard to the possession of German nationality, is, it must be admitted, sufficiently complicated in order to lend some justification to the second of the special rules dealing with German nationality. This is section 8 (2) which reads as follows:

‘For the purposes of this Act a person who at any time was resident in Germany shall be deemed to have been a German national at that time unless it is proved to the satisfaction of the administrator, within such time and in such manner as may be prescribed by an Order in Council or order made under section 1 of this Act, that he was not a German at that time’.

This presumption of German nationality has no precedent either under the Versailles Treaty or under any of the Orders made under the Satellite Peace Treaties. Having regard to the widespread destruction of documents and archives on the Continent of Europe it may have far-reaching consequences. It does not refer merely to persons who were resident in Germany after September 3, 1939, but generally to persons who at any time were resident there. On the other hand the rule merely provides that such a person is presumed to have been a German national at that time. However, if a person is deemed to be a German within a certain period, he is also deemed to be a German after the expiration of this period, except if it can be proved that he lost his German nationality thereafter. If A was resident in Germany until 1927, emigrated in that year to Poland and died there, he is presumed to have been a German until his emigration to Poland. The consequences would appear to be that unless it can be proved that he acquired Polish nationality after that date, both he and his descendants are presumed to be German nationals within the meaning of the Act.

Recent events on the Continent of Europe have multiplied both the number of persons who possess several nationalities and of those who are Stateless. International law is presumed to lean against Statelessness or dual nationality, but recent developments have once again proved the inefficiency of such general principles, however well-intended they may be. In interpreting the Act the sole test would appear to be whether under German law a person possessed German nationality. A person who is, say, both Swiss

³⁸ The courts of this country refuse recognition to the legislative acts of a non-recognised government, see Lauterpacht, *Recognition in International Law* (1947) and the authorities there referred to.

and German is treated as a German under the Act. This applies even to persons who in addition to being German nationals are British subjects. The Act provides no exception in their favour. They can only hope to profit from the exercise of the administrator's discretion under section 1 (6) of the Act. This interpretation is fully borne out by the Rules of Accounting. According to these the property of persons who are British subjects in addition to being German nationals may only be excluded from the charge on reparations account if a number of requirements are complied with, including, inter alia, the requirement that the person in question must at some former time have been a resident of this country and have left Germany in order to establish his permanent residence in the same I.A.R.A. country. Assuming a British subject who also possesses German nationality lived until 1925 in Belgium, then from 1925 to 1947 in Germany and since that date in this country, his property would be liable to be included in the charge under the Brussels Rules.

(b) It remains to deal with the conception of 'resident'. Under the common law relating to trading with the enemy residence clearly requires a stay of some duration. Mere physical presence is not sufficient. This is clear from Lord Parker's remarks in *The Anglo-Mexican* where he said that permanent residence meant nothing else but submission to the benefit of the laws of the enemy country.³⁹ Similarly the common law notion of residence requires that the stay in the enemy country must be voluntary. This conception was applied in the interpretation of the Versailles Treaty. Germans who had been forcibly deported from British territory to Germany were considered not to be residents of Germany if they left Germany as soon as possible.⁴⁰ In *Baumfelder's Case* the Canadian Court of Exchequer held that Baumfelder was not a resident of Germany, although he had stayed in Germany for a number of years during and after the outbreak of the war. He had been deported to that country and had been prevented from leaving it by his extreme poverty, but had after some time succeeded in financing his return to Canada.⁴¹ During the present war, however, a more stringent interpretation of the term 'resident' within the meaning of section 2 of the Trading with the Enemy Act has been preferred. In *Hatch's Case* it was said that residence meant no more than physical presence whether voluntary or not.^{41a}

³⁹ [1918] A.C. 422.

⁴⁰ *Re Otto Cloos and Chota Nagpur Co-operative Society* (1934) Décisions des Trib.Arbitr.Mixtes, Vol. 4, p. 13, see also McNair, *Legal Effects of War*, 3rd ed. (1948) p. 52.

⁴¹ Canada L.R. (1927) Exch. p. 86, Annual Digest, 1927-8, No. 372.

^{41a} [1948] Ch. 592.

This view led in *Vandyke v. Adams*⁴² to the absurd question whether British prisoners of war in Germany were enemies within the meaning of the Act of 1939, a question which was, of course, answered in the negative, but without any rational arguments. The precedents from the last war were in neither case referred to by counsel. It is submitted that the absurdity of the question posed in *Vandyke v. Adams* is already a weighty argument against the basic assumption that residence equals physical presence. Another argument follows from the Rules of Accounting. These distinguish clearly between physical presence and residence. The Distribution of German Enemy Property Act refers to residence only and should therefore be interpreted as wishing to exclude mere physical presence. There is an obvious difference between the task of interpreting the Trading with the Enemy Act, 1939, and that of interpreting the Distribution of German Enemy Property Act, 1949. The former permitted the taking of measures of control and administration, which were essentially of a provisional character and were necessitated by the grave exigencies of the war situation. The latter deals with a final solution, sanctions grave inroads upon private rights and has come into force long after the emergency situation has come to an end. Even if *Hatch's Case* and the case of *Vandyke v. Adams* had been rightly decided, it would not necessarily follow that the term 'residence' in the 1949 Act is to be interpreted in the same manner as the same term in the 1939 Act.

3. We have seen that the persons in the second group are characterised as holders of German enemy property only if they were resident in Germany on or after September 3, 1939. This requirement does not apply to those persons who are included in the third group. This group also comprises persons who were German nationals on or after September 3, 1939, but the requirement of residence is replaced by two alternative requirements: the individual in question must either have been on one of the lists of specified persons, popularly known as 'black lists', or his property must have been subject to control under section 7 of the 1939 Act at a time when he was not an enemy. The first part of this rule may result in an interesting legal problem in the field of international law, which need not be discussed in the present connection: many of the persons on the 'black list' were residents of neutral countries and may have become neutral citizens during the course of the war. The use of their property in this country for distribution under the present Act may possibly result in objections from the governments of the States whose nationals and residents these persons are.

⁴² [1942] Ch. 155.

The second part of the rule seems partly to refer back to section 7 (3) (ii) of the Trading with the Enemy Act, 1939, where it is provided that certain measures of control taken in pursuance of an order made under the section shall not be invalidated or affected by reason only that at a material time a person interested in the property who was believed by the custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject. To the extent to which this is the intention of the second part of this rule, it would also not appear to be free from objections. It would seem to legalise post factum administrative acts which were not justified by the facts of the case. The same objections which apply to the first part would also appear to apply to this part of the section.

Measures of control may in the individual case have been taken against a Swiss national residing in Switzerland, as *e.g.*, in the case of a person who went from Germany shortly after the outbreak of the war to Switzerland, obtained Swiss nationality and resided there until now. Presumably in all these cases the sole importance of the rule would consist in protecting the administrator against claims for the payment of damages in the unlikely, but not impossible case that any person affected by this rule should refrain from making an application for the release of his or her property in time before the distribution takes place. It is hardly conceivable that in cases of this type the Board of Trade would, on application, not order the property to be released. The second part of the subsection would also appear to cover those cases in which measures of control under section 7 of the Trading with the Enemy Act, 1939, were taken against the property of an enemy subject who was not an enemy, *e.g.*, because he did not reside in enemy territory. Thus if the property of a German national resident in, say, Southern Rhodesia, were treated under the Act, this property would be covered by the rule.

The second part of the rule seems similarly to refer back to section 7 (3) (i) of the Trading with the Enemy Act, 1939, which maintains the validity of measures of control taken against property or interests of a person who was an enemy or enemy subject and who had died or had ceased to be an enemy or an enemy subject. Assuming that a German national residing in Germany owned the property on the decisive date, but died thereafter and was succeeded by British subjects, and assuming further that measures of control were taken after he had in fact died, the property in question would now appear to be liable to be treated under the Act. The example just given would seem to show that protection of the administrator rather than the actual exercise of the powers in question must be the purpose of this subsection; it is

hardly conceivable that property of this description would be distributed under the Act. The Brussels Rules of Accounting do not contain any equivalent provision and there would appear to be no other reason for submitting property of this type to treatment under the Act.

It deserves to be noted that in one respect the provision contained in the Act is more narrowly defined than that contained in the Trading with the Enemy Act, 1939. The 1949 Act requires that the property in question must on the day to be appointed by Order in Council have belonged to a person who was a German national on or after September 3, 1939. Thus, if the German national who owned the property had already died, section 7 (3) (i) would apply, but not the present rule of the 1949 Act. The effect is that where, *e.g.*, property had been vested in the custodian and been sold by him, the vesting and sale would remain unaffected, but the proceeds would not be liable to distribution under the present Act. If the heirs would be residents of the Netherlands the property would, it is submitted, have to be released under the special agreement concluded with that country.⁴³

The extension by the third group of the number of individuals whose property is liable to distribution is of considerable importance, because the fifth group of enemy holders refers to German-controlled bodies of persons and a body of persons controlled by a person as mentioned in the third group is included in the fifth group. It may, therefore, be permitted to mention a limitation of the third group which follows clearly from the wording of the second part of the rule defining the third group. This requires that the individual in question actually had property in this country and that this property had actually been subjected to measures of control. It is not sufficient that if he would have had such property, it would have been so subjected. The Act clearly requires that measures of control were taken. The fact that they could have been taken is not sufficient; it does not matter whether the sole ground why they were not taken consists in the fact that no property of the individual in question was available in this country.

4. The fourth group of holders is defined as

‘any body of persons (whether corporate or unincorporate) which on or after the said day was a body of persons incorporated or constituted in, or under the laws of Germany’.

⁴³ Cmd. 7627, Treaty Series, No. 10 (1949) of January 14, 1949. This Agreement follows largely the precedent set by a similar agreement concluded with France, see Cmd. 6675, Treaty Series, No. 6 (1945) of August 29, 1945, on which see E. J. Cohn and G. R. Holland, ‘Déblocage des Avoirs Français en Angleterre’ in *Revue Critique de Droit Int.Privé* (1949), pp. 473 ff.

The term 'body of persons' has only recently become a technical term of English law. It did not occur in the Versailles Peace Treaty or in any order made thereunder. It makes its first appearance in our field in the Trading with the Enemy Act, 1914.⁴⁴ It reappeared in the Trading with the Enemy Act, 1939,⁴⁵ and seems to have invaded from there, both the Brussels Rules of Accounting and the Satellite Peace Treaties. On the other hand the words 'incorporated or constituted' do not occur in the Brussels Rules, which in their place employ the word 'organised'. There can, of course, be no doubt that German Aktiengesellschaften, G.m.b.H.s., corporations of public law, such as municipalities, universities, etc., are covered by the term. The same is true of unincorporated organisations such as associations under private law, as e.g., the German trade unions and co-operatives, many of which did not seek incorporation. A more difficult problem is constituted by partnerships. German law distinguishes between two types of partnerships⁴⁶: partnerships under civil law and partnerships under commercial law. Neither is incorporated. The chief difference between the two is that the commercial partnership carries on a commercial business under a business name. Property owned by either type of partnership is in law owned by the partners themselves in common ownership, although the law prescribes that such property is in certain respects, especially in bankruptcy proceedings, treated differently from other property of the partners. It is submitted that a German partnership is legally no more than a contract between the partners. It means that a majority of persons is bound together by contractual arrangements, but possessing no separate legal entity and no constitution. If it can be called a 'body of persons' (which is not certain) it cannot be called one that is either incorporated or constituted, possessing in law neither 'corpus' nor constitution. This is particularly clear in the case of partnerships under civil-law which may be dissolved by any partner at any time

⁴⁴ See Preamble to the Trading with the Enemy (Amendment) Act, 1914.

⁴⁵ See s. 2, Trading with the Enemy Act, 1939.

⁴⁶ See M. Wolff, 'Commercial Law' (in *Manual of German Law*, published by the Foreign Office), Vol. 1 (1950), pp. 234 ff. For a comparative treatment of an offene Handelsgesellschaft see Wieland, *Handelsrecht*, Vol. 1 (1921), pp. 398 ff. and Mügel in *Rechtsvergleichendes Handwörterbuch*, Vol. 5 (1936), pp. 465 ff. The latest German work on commercial partnerships is Hueck, *Recht der offenen Handelsgesellschaft* (1949). German legal theory operates with the conception of the 'Gesamthand' which is not too dissimilar to that of 'joint holding'. It is alike applicable to partnerships—whether civil or commercial—and to communities of heirs. Erskine Holland, *Jurisprudence*, 10th ed. (1906), p. 295, note 2, is quite incorrect in saying that the German 'Kommanditgesellschaft' was in fact a limited liability company. It is a limited liability partnership, though somewhat more strictly organised. In this connection it should be noted that the Act requires either incorporation or constitution. 'Organisation' in Germany is not sufficient.

provided the partnership contract does not require a period of notice.⁴⁷ The commercial partnership is not essentially different in structure, though differing in a considerable number of details.⁴⁸ For similar reasons a community of heirs under German law⁴⁹—whose structure in some ways resembles that of a partnership—is not a body of persons incorporated or constituted in Germany. In the cases of property owned by a partnership or a community of heirs the test is, therefore, whether one or several of the partners or heirs are German nationals resident in Germany during the relevant time or covered by subsection (c). This solution would also appear to deserve preference in view of the large number of allied nationals who had formed partnerships under German law or were or are members of a community of heirs under German law.

The words ‘incorporated or constituted in or under the laws of Germany’ would appear to signify that the body must either have its centre of administration in Germany or have been formed under German law. The mere fact that the act of formation took place in Germany cannot reasonably be considered as relevant. A Swiss Aktiengesellschaft cannot be considered as a body constituted in Germany, merely on the ground that the meeting of its founders took place by some chance on German territory. The words ‘the laws of Germany’ signify by no means the same thing as ‘German law’. German law was, after 1937, introduced in a great many territories which did not form part of Germany as defined in the Act. The ‘laws of Germany’ must be understood to refer to the laws in force in those territories which on March 1, 1938, were part of the German State.

There can be little doubt that the provision relating to bodies of persons formed in or under the laws of Germany is too widely drawn. There are naturally numerous commercial companies formed under German law whose shareholders are predominantly nationals of a country other than Germany, and among these are many which are under British control. Section 1 (7) is intended to deal with such British controlled companies. It reads as follows :

‘Where any German enemy property, on or at any time after the third day of September, 1939, belonged to, or was

⁴⁷ Section 723, German Civil Code.

⁴⁸ The German partnership—like the English—differs in this respect remarkably from the conception of partnership adopted in France and Italy and, following them, in Hungary, Bulgaria and Roumania. The remarks made in the text on the subject should therefore be taken to apply only to the administration of German and—if the Peace Treaty with Austria should contain a corresponding clause—to Austrian property, as Austrian law agrees on the point in question with German law.

⁴⁹ See E. J. Cohn, *Civil Law, l.c.*, p. 191.

held or managed on behalf of, a German company, and it appears to the Board of Trade that the company was on the said day controlled, directly or indirectly, by a United Kingdom company, the Board may treat that property for the purposes of the last preceding subsection, to such extent as the Board think fit having regard to the extent of the interest of the United Kingdom company in the German company, as property to which the United Kingdom company would have been entitled but for the operation of the Trading with the Enemy Act, 1939, or any order made thereunder.

‘In this subsection, the expression “German company” means a body incorporated in, or under the laws of, Germany, and the expression “United Kingdom company” means a body incorporated in, or under the laws of, the United Kingdom’.

It will be seen that the subsection does not provide for an exception from section 8. The property even of a British-controlled German company remains German enemy property. The subsection is not part of section 8, which contains the definitions of the terms employed in the Act. It is an addition to section 1 (6) which grants power to the Board of Trade to give directions to the administrator requiring him to retransfer to the original owner any German enemy property. Its importance lies in the fact that it extends the powers of discretion granted to the Board of Trade. Under section 1 (6) the Board may order the retransfer of property only to the original owner. This would not have enabled the Board of Trade to treat the whole or part of the property of a British-controlled German company as being property of those who control the German company. This power is given to the Board by subsection (7). It is a purely discretionary power. The British company controlling the German company has no claim in law to obtain such transfer. It is entirely at the mercy of the Board of Trade. The Board’s discretion is complete. It extends to the appreciation of the evidence: the subsection applies only if ‘it appears to the Board of Trade’ that the United Kingdom company controlled the German company. It also extends to the measures to be taken: even if it appears to the Board that the United Kingdom company exercised control, the Board may not treat the property as belonging to the United Kingdom company, and even if the Board decides to exempt the property from the operation of the Act, it is left to its free discretion to what extent this is to be done.

The section was inserted into the Act at a late stage, *i.e.*, during the third reading in the House of Lords. One might well

ask whether it does not show signs of hasty draftsmanship. The most surprising aspect is perhaps the fact that it apparently envisages only the possibility of control by a United Kingdom company and not that of control by one or several individual United Kingdom shareholders. Where one or several persons, not being 'a body incorporated in, or under the laws of, the United Kingdom', own the majority of or all the shares of a German company the section does not apply. Thus the section would not apply, *e.g.*, where two citizens of the United Kingdom have formed a partnership which, in the course of its business, has acquired 75 per cent. of the shares of a German company. The omission has serious consequences. Section 1 (6) only grants power to the Board of Trade to order the transfer of property to its original owners. The partners were at no time owners of the property of the German company. The Board of Trade has, therefore, no power to order the transfer of the property or of any part of it to the partners. The property must be treated as German enemy property.

No less strange is that no provision is made in favour of persons other than United Kingdom companies. The Brussels Rules had dealt with non-German interests generally. Under the Brussels Rules a signatory government is entitled to exclude from the charge 'assets . . . owned by any body of persons organised under the laws of Germany, in which body there are non-German interests, to the extent that such assets proportionate to the non-German interests in the body are released to such non-German interests'. No similar provision exists in the Act, and as the Board of Trade under section 1 (6) has power to order the transfer of property to its original owner only, it is clear that non-German majority shareholders cannot invoke that section. A more benevolent treatment applies at present only in favour of French and Netherlands shareholders. These are protected by the agreements concluded with their respective governments on intercustodial conflicts, which themselves are referred to in section 3 of the Act. But there is no similar rule in respect of others. Naturally nationals of other Allied countries may hope for the conclusion at a later date of similar intercustodial agreements. But no such hope exists for nationals of neutral countries and Stateless persons, whose position may be considered to merit particular attention in those cases in which their German holding was the consequence of their inability after the introduction of exchange control regulations in Germany to invest their property in Germany otherwise than in long-term investments in German companies.

The subsection also differs in a remarkable way from the Brussels Rules in that it requires the British company to have had control. It is quite conceivable that even majority shareholders have not had control, especially in view of the fact that voting pool arrangements, shares with multiple voting power, etc., were widespread devices adopted in German company law practice after 1920 in order to exclude foreign control of German companies.⁵⁰

It would appear that there is only one way out of difficulties of this nature. In cases of this type the Board of Trade may require the administrator to retransfer the funds to the original German owner on an undertaking by the latter to transfer the funds in this country to those non-German persons who hold an interest in these funds. This is, however, not in all cases a satisfactory solution. Owing to the existence of very strict exchange control regulations in the Federal Republic of Germany it will at best be a very cumbersome procedure. But in a number of cases it will prove virtually impossible to obtain the undertaking referred to from the German company. Many German companies, especially those from the zone now under Polish control, have ceased to exist. Others have their headquarters in the Soviet Zone and would conceivably be reluctant to enter into any undertakings which will ultimately benefit creditors in Western countries. Others again exist in a position of doubtful legality, having one board of directors in one zone and another in another zone.⁵¹ Finally, a considerable number of companies have been nationalised in the Eastern Zone or were merged with nationalised firms or are under the control of trustees appointed by the Soviet Military Administration or one of the Eastern Zone German Ministries of Economics.⁵² Considering situations of this type, it is possible to consider the desirability of an enactment of an amendment intended to widen the powers of the Board of Trade so as to include cases where persons other than United Kingdom companies have an interest, and perhaps not necessarily a controlling interest, in a German company.

⁵⁰ See M. Wolff, *Commercial Law, L.c.*, pp. 241 f.

⁵¹ A very considerable discussion on this topic has been going on for some time in German legal literature. The size of the problem can be gathered from the fact that until their recent reconstruction all the big banks were in this dubious position so that it became necessary in the three Western Zones to introduce a uniform statutory provision (s. 6 of the 35th Carrying-Out Ordinance of the Conversion Law (Military Government Law No. 62)) exempting the Western branches of the banks from all responsibility for debts incurred in the Eastern branches or even by headquarters situated in the East.

⁵² See SMA Ordinance No. 124.

5. It remains to deal with the fifth and last group of owners of German enemy property. This is defined in the Act as 'any body of persons (whether corporate or unincorporate) which on or at any time after the said day was controlled by any such individual or body as is mentioned in paragraph (b), paragraph (c) or paragraph (d) hereof'.

This section thus introduces into the Act the control test as developed since the decision of the House of Lords in the *Daimler Case*.⁵³ It constitutes a further step on the victorious forward march of that test. Significantly enough this forward march has on the whole remained confined to English law.⁵⁴ Thus neither the Versailles Treaty nor the Order in Council made under it nor the Satellite Peace Treaties use it. More important in the present connection is that the Rules of Accounting do not use the control test either. The rules use alternatively the incorporation and the interest test. Assets owned directly or indirectly by bodies of persons organised in and under the laws of Germany must be charged to reparation account.⁵⁵ Assets of bodies in which there has been a German interest must be so charged, if they have been seized, have not been released and are not intended to be released.⁵⁶ This on its part is supplemented by the rule, which has already been referred to, according to which such assets if they are released to non-German assets, may be excluded from the charge.⁵⁷ No doubt the divergence between the test employed by the Act and that used by the Brussels Rules will result in intricate problems for the government accountants. On the other hand the fact that German control is not a test employed by the Brussels Rules, and does therefore not result in a charge on the reparation account, enables the Board of Trade to exclude from the treatment as German enemy property

⁵³ [1916] 2 A.C. 307.

⁵⁴ The development of the control test has recently been described by Domke, 'The Control Test of Corporations', in *International Law Quarterly*, Vol. 3 (1950), pp. 52 ff., see furthermore Bishop, 'Judicial Construction of the Trading with the Enemy Act', in *Harvard L.R.*, Vol. 62 (1949), pp. 721 ff. It is remarkable how little consideration has so far been given to the *de lege ferenda* aspect of the control test and to its ability to serve purposes other than those of safeguarding measures to be taken during—not after the conclusion of—a war. It would lead too far to pursue the topic in connection with the subject-matter of the present article. It is, however, submitted that for the purposes of a final settlement such as is under contemplation here the control test is unsuitable and must be replaced by what may be styled 'interest test' and according to which the proportion of substantive interests is the decisive point to be taken into account. The Brussels Rules of Accounting have adopted this test in preference to the control test and, it is submitted, rightly so. Domke, who professes to support the control test, would in effect seem to favour the interest test, as one may gather from his remarks on p. 56.

⁵⁵ Part II A 4.

⁵⁶ Part II B 1 (b).

⁵⁷ Part III J.

property of a company under German control in which non-German interests are predominant.

It is, however, submitted that the use of the control test in the present context places before the courts a task of a special character which they did not have to face in the past. One can well understand the use of this test in connection with the interpretation of the Trading with the Enemy legislation in time of war. The avowed purpose of this legislation is to reduce the enemy's capacity to wage war. A body of persons under enemy control is *ex hypothesi* of assistance to the enemy in his conduct of the war. Therefore the seizure of such a body's property under the Trading with the Enemy legislation is clearly justified from the fundamental point of view on which this legislation is based. Different considerations must, however, necessarily apply to the final distribution of enemy assets if awkward situations are to be avoided. It is easy to give examples of such situations. During the war Germany occupied the greater part of Europe. Numerous bodies of persons incorporated in the countries of all our European enemies were therefore placed under the control of German enemy custodians.⁵⁸ If we were to adopt the same control test as must be adopted in interpreting the Trading with the Enemy Act, we would no doubt have to hold that such companies thereby complied with all the requirements of the fifth group, and that their property is therefore liable to be treated under the Act. This is an impossible solution. It is not rendered less impossible by the fact that the administration can in the exercise of its powers under section 1 (6) order the release of such property to its rightful owner. It cannot be the meaning of the Act that bodies of persons who are in fact consisting of Allies—not of Germans—should depend for the release of their property on the discretion of the administration. If the control test would be interpreted so as to apply in so indiscriminate a manner, it would subject to the unfettered discretion of the Board of Trade all the assets in this country of a very large number of the most important Allied financial and industrial corporations on no other ground than because they were during the war subject to German enemy custodianship. This would be so extensive a dispossession of Allied property rights in this country that it cannot be assumed to be the meaning of the Act. That the dispossession may be followed by an administrative revesting of

⁵⁸ The German legislation on this topic will be found to be systematically arranged in the loose-leaf work by Krieger-Hefermehl, *Behandlung feindlichen Vermögens* (1940).

rights is of no importance in this connection. Our Allies must have a legal right to recover their property in this country, if all that happened was that they were placed under enemy custodianship during the war.

It is admitted that the wording of the section does not make any distinction between a control which was temporary and one which was permanent, or between one which resulted from the operation of German war-time legislation, and one which resulted from economic ties with German industrial firms. The situation with which we are confronted in interpreting this section is, therefore, in a remarkable manner similar to that which was faced by the English courts when they had to consider the question whether an English prisoner of war in German hands was to be considered as an enemy within the meaning of the Trading with the Enemy Act, 1939. The court had to choose whether to interpret the term 'resident' so widely that it included a prisoner of war, or to restrict it in such a manner that prisoners of war were excluded from it. The court, as we have seen, chose the former alternative, but at the same time—without using any arguments whatsoever in support of its decision—refused to apply the Act to British prisoners of war in German hands.⁵⁹ This, it is submitted, is a faulty method of interpretation. The terms employed in a law must be interpreted in such a manner that the courts can base their decisions on them, and not in a way in which they are forced to choose between the alternative of either making decisions which are wholly inequitable or of openly disobeying their own interpretation. The result is, therefore, that the only way out is a reasonable reformulation of the conception of control. The way for this is certainly open to the courts: the question is an entirely novel one. The fact that the term 'control' has been used both by the common law and in other statutes does not mean that it must have the same meaning in the present Act. The task is to find a definition which excludes from the term cases whose inclusion on the present occasion would not make sense. In thus delimiting our task I pay due regard to the fact that the Act obviously intended to leave a large margin of discretion to the administration. But the margin cannot be so wide that the legal rule would thereby become absurd. Cases in which control was solely established by war-time decrees in Allied territories occupied by the Germans must be outside the control test as laid down in this law.

They cannot, however, be the only cases. A Swiss company had three directors, among whom there is one German residing in

⁵⁹ See pp. 539, 540, above.

Germany. The two Swiss directors were killed in a motor car accident in Switzerland in 1944. Until their two successors are elected, the German director is in sole control. Even if this period of sole control were to last for two weeks only, the requirements of the fifth group would be complied with. This, too, makes no sense. It is, therefore, necessary to exclude from the conception of control cases in which the power exercised by the German was of an accidental and temporary character, not due to any voluntary action of the company or of those substantially interested in it.

It cannot be said at present whether the practice of the courts will offer sufficient material from which it will be possible to develop a new conception of control such as is required for the present purpose. The practice of the administration may render this unnecessary. It would perhaps be regrettable if this were so. The present Act would, it seems, give an opportunity to test the limitations of the usefulness of this conception for purposes other than those for which it was intended under the Trading with the Enemy law which created it.

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(To be concluded)

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FOREIGN INVESTMENT AND INTERNATIONAL LAW

ALTHOUGH the movements of capital which are the basis of the various types of foreign investment have been a characteristic feature of international relations for a considerable time, it cannot be said that they have resulted in the formulation of a coherent body of international law. Whilst there are many able studies of particular aspects of the law involved, *e.g.*, of the 'Gold Clause' and of the 'Calvo Clause', few attempts have been made to discuss the law which links these individual topics to each other. An awakening of interest in the economic aspects of international law¹ may constitute sufficient excuse for the present attempt to initiate such a discussion.

This new interest need cause no surprise now, at a time when economic problems in general are receiving as much attention as those of a political nature, or rather, when the inter-relation of the two types of problem is being recognised. For with the recognition of the principle of self-determination in the treaties which ended the first world war, the solution of the chief contemporary political problem was achieved—the subjects of international law had moved, as it were, from status to contract, or were in the process of so doing. But, as has been found in the sphere of municipal law, that is not the end of the story. Astute politicians have always recognised that national self-determination is not an end in itself in spite of the catch-phrase 'Trade follows the flag'—and the relation between national independence and economic development has recently been considered within the United Nations Organisation. After a discussion centring on the International Monetary Fund and its role in economic development, it was decided to set up a Technical Assistance Board to assist the development of backward areas.² But before any estimate can be made of the manner and

¹ See, *e.g.*, Schwarzenberger, 'Province and Standards of International Economic Law', 2 I.L.Q., p. 402; and Friedmann, 'International Public Corporations', 6 M.L.R. 185. And some of the problems with which we are here concerned are touched upon in a note on foreign investment in 42 A.J.I.L. 121.

² It was to give such assistance that the International Bank for Reconstruction and Development was established. See also Art. 12 of the Final Act of the Havana Conference on Trade and Employment, which recognises that 'international investment, both public and private, can be of great value in promoting economic development and reconstruction, and consequent social progress'; but later there is also recognised the right of a member 'to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies'.

extent of United Nations control of foreign investment, an appraisal of the present law and practice must be attempted.

An immediate distinction which must be drawn is that between public and private investment, *i.e.*, between cases where a State is the investor (usually in the guise of lender to another State), and those where the capital is provided by individuals. And where the investor is a private citizen, the investment may have a public aspect if the securities are issued by a government, by a State corporation or, perhaps, by a local authority.

Fischer Williams has pointed out that although inter-State transactions, usually in the form of a dealing between monarch and monarch, were of great importance before the nineteenth century, they were for some time thereafter overshadowed by transactions involving private individuals.³ This was, however, a temporary phenomenon, for such inter-State dealings have now, to say the least, regained their former importance. In the two years between May 1945 and June 1947, some thirty-nine governmental loans were made to the European countries devastated by war.⁴ But the nature of these loans is, in general, such as to withdraw them completely from our consideration for present purposes, for they were in the nature of commercial credits rather than investments.⁵ 'It is clear . . . that a large part of international trade has been kept going in 1948 by means of government loans and grants'.⁶ The same can be said of the loans made by the International Bank for Reconstruction and Development. The close link between such transactions and the difficulties which beset international trade can be seen from the fact that the U.S. Import-Export Bank, through which the U.S. Government makes such loans, has laid down as part of its general policy that 'the Bank does not ordinarily finance expenditures other than for United States goods and services'.⁷ In view of this, we need not here dwell on the paucity of legal rules governing such transactions⁸; the one

³ 'International Law and International Financial Obligations arising from Contract', *Bibliotheca Visseriana*, Vol. 2, at pp. 3-4. The debts of the 1914-1918 war clearly ended this process—see Mann, 'The Law Governing State Contracts' in 21 B.Y.I.L., at pp. 28-31.

⁴ Listed in *Financial Needs of the Devastated Countries*, published by the U.N. Dept. of Economic Affairs.

⁵ Various proposals regarding international public works have been made by the I.L.O., which would have resulted in international capital movements had anything come of them. See also, however, 'Convention relating to Hydraulic Power affecting more than one State', *Treaty Series*, Vol. 36, p. 75.

⁶ 'International Loans and Grants during 1948', in *Major Economic Changes in 1948*, published by the U.N. Dept. of Economic Affairs.

⁷ Quoted in 42 A.J.I.L., p. 616.

⁸ 'I will be bold enough to say that if the analogy of the Hague Convention is not applied, international law has at present no definite and separate rules

which is of interest, *viz.*, that regulating State succession to debts, will be dealt with, in another connection, below.

Mention must also be made of certain transactions of the inter-war period which would at first seem to have a genuine international character, *viz.*, the so-called League Loans, made to Austria and several other European countries.⁹ The fact that these loans were issued under the auspices of the League (with additional governmental guarantees, in some instances), gave investors a confidence which they might not otherwise have had, and was undoubtedly an important factor making for the success of the schemes involved. For, like the loans mentioned above, these did not involve any real investment but were rather for the purpose of currency stabilisation and for the solution of refugee problems. The fact that these loans were taken up by private investors leads us to a consideration of a second type of transaction—private investment in the public sphere, *i.e.*, by the purchase of government bonds, or in borderline cases, by the taking of concessions, the operations of public utility undertakings or by participation in State corporations.

The focal point of controversy aroused by these transactions has been the right of a State to intervene in favour of its nationals holding investments abroad. It is unnecessary to recapitulate here the details of the history of the change in attitude of the European powers from that expressed in the famous memorandum of Lord Palmerston, of the enunciation of the Drago Doctrine and of the resultant compromise expressed in the Hague Convention of 1907.¹⁰ It is sufficient to note that the Contracting Powers there agreed not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by another government as being due to its citizens unless there had been, *inter alia*, a refusal of an offer of arbitration. It would seem, therefore, that a right of peaceable intervention was recognised, and this was important in view of the establishment of the Hague Court of Arbitration and the Permanent Court of International Justice, for it permitted a State to take the case of one of its nationals before

for pecuniary disputes between States', Fischer Williams, *op. cit.*, p. 59. The Hague Convention referred to is, of course, that of 1907, relating to claims by individual citizens of one State against the government of another.

⁹ A list of these loans and an explanation of their purposes may be found in *Principles and Methods of the Financial Reconstruction Work*, published in 1930 by the League of Nations. See also Hajnal, 'Les Précédents de l'Emprunt accordé par la Société des Nations à l'Autriche', in 5 *Revue de Droit International et de Législation Comparée*, p. 442; and also Fischer Williams, *Chapters on Current International Law and the L. of N.*, at pp. 407-411. Another League undertaking was the preparation of a draft Convention on 'Financial assistance to Members involved in war or threat of war'.

¹⁰ A detailed account can be found in Fischer Williams, *International Financial Obligations*, at pp. 9-48.

those tribunals, as happened in the cases of the *Serbian and Brazilian Loans*.¹¹ The fact that these cases were concerned with the mode of payment rather than with the question of liability to pay has made them the object of some criticism,¹² but it would have been unfortunate had the court decided that it had no jurisdiction.¹³ For were the lender to sue in the courts of the debtor nation, he might have to face not only procedural difficulties, but also legislation invalidating any 'gold clause' contained in the contract.¹⁴ The third alternative is for the lender to sue in the courts of his own State, and this course has special attractions where the debtor State has assets there. But in most cases such a suit cannot be maintained, the foreign State being given immunity from legal action,¹⁵ although there are wide divergences both in the practice of States and in the views of theoreticians as to the extent of this immunity. Such divergences are accentuated where one of the parties concerned in the investment is not the foreign State itself, but a State or public corporation.¹⁶ Such difficulties may well appear insuperable at a time when government restrictions of all sorts are being placed on the rights of foreign creditors,¹⁷ and it is not surprising, therefore, that extra-judicial methods of obtaining payment have been resorted to. Diplomatic intervention by States in favour of their nationals who were creditors has in many cases been followed by agreements as to payment to them.¹⁸ It is unfortunate, of course, that this precludes equality of treatment as

¹¹ P.C.I.J. Publications, Series A, Nos. 20-21.

¹² See, e.g., Ténékides in *Revue de Droit International et de Législation Comparée*, Vol. 11 (3rd Series), 'Dans [les affaires des emprunts serbes et brésiliens] le débat portait sur quelles bases monétaires le service financier des emprunts serait effectué. Il est difficile d'y discerner l'ombre d'une violation d'engagement internationale ni même d'un principe de droit international, générateur d'une obligation de réparer dont le refus d'exécution eût pu constituer la violation visée aux articles 36 du Statut et 13 du Pacte' (p. 483).

¹³ For even though there is no guarantee that a judgment of an international court will be satisfied, its moral value is great.

¹⁴ *R. v. International Trustee, etc.* [1937] A.C. 500, provides a good example of this. Comparative studies of the more important cases concerning the gold clause can be found in Prof. Wortley's 'The Gold Clause', 17 B.Y.I.L. (1936), p. 112, and Curtius, 'Le caractère de droit public des législations abrogatives des clauses-or', *Clunet*, Vol. 66 (1939), p. 32.

¹⁵ See, e.g., the Belgian case *Bartin v. République Hellenique* and the other cases cited by Fitzmaurice in 'State Immunity from Proceedings in Foreign Courts', 14 B.Y.I.L. (1933), p. 101. Also De Visscher, 'Les gouvernements étrangers en justice', *Revue de Droit International et de Législation Comparée*, Vol. 3 (3rd Series), pp. 149, 300.

¹⁶ See the arguments in the U.S. case *Hannes v. Kingdom of Rumania Monopolies Institute* in a note in *Clunet*, Vol. 67 (1940-45), p. 403.

¹⁷ For an account of these and an excellent discussion of the problems involved, see Domke, *Internationale Schutz von Anleihegläubigern*.

¹⁸ The agreements between Germany and Sweden following the German ban on payments to foreign creditors are typical. One deals with payment of interest on the Swedish bonds of the Dawes, Young and Krueger Loans (*Treaty Series*, Vol. 154, p. 267); another, inter alia, with payments to holders of bonds of other public loans (*Treaty Series*, Vol. 154, p. 273).

between creditors of different nationalities; but the same problem exists where a judicial settlement is sought, and this has led Fischer Williams to plead for some sort of 'representative action', which would result in equal treatment for all the holders of a particular series of bonds irrespective of their nationality.¹⁹

All the investments so far discussed have been of the type which economists would term 'financial', as opposed to 'real', meaning by the latter term, in the words of one publicist, 'the canalisation of a part of current productive activity into the building of railways, highways and ports, the construction of factories and school buildings, the installation of machinery, the equipment of laboratories and educational institutions and the maintenance of their personnel'.²⁰ Certain investments of this type will have a public nature, since they will be founded on the grant of a concession by the State in which the investment is to be located. With regard to such concessions there exists a considerable body of law. Their grant is, of course, usually a transaction of a contractual nature, involving the investor and the foreign State, yet the request for the grant of a concession may have the backing, open or covert, of the investor's own State. Many treaties show that this practice is established. By a convention between the United Kingdom and Russia signed in 1907, for example, the British Government undertook not to support requests by British subjects for concessions in a specified part of Persian territory, the Russian Government making a complementary undertaking.²¹ And the continuance of certain concessions granted by the Portuguese Government has been regulated by an agreement between that Government and the United Kingdom.²² Other examples of government intervention resulting in treaty arrangements regarding concessions may be found in the peace treaties which ended the 1914-1918 war. By Art. 316 (a) of the treaty with Turkey, for example, the Turkish Government undertook to modify its legislation so as to allow companies of Allied nationality to hold concessions in Turkey.²³ And although the 'most favoured nation' clause is usually treated as referring more particularly to international trade,²⁴ it may also apply to the grant of concessions.²⁵ More specific than such

¹⁹ *International Financial Obligations*, at pp. 50-51.

²⁰ Staley, in the International Labour Organisation's publication, *World Economic Development*, p. 37.

²² *Treaty Series*, Vol. 36, p. 125.

²¹ *Hertslet's Commercial Treaties*, Vol. 25, p. 1044.

²³ See also the Lausanne Protocol, *Treaty Series*, Vol. 28, p. 203.

²⁴ See, e.g., Schwarzenberger's outline of the 'functional scope' of the clause, in 22 B.Y.I.L. (1945), at p. 108.

²⁵ It was agreed in a treaty between Denmark and Persia that a reciprocal grant of most favoured nation treatment was not to apply to the special privileges granted by Persia to companies whose activities were regulated by special concessions—*Treaty Series*, Vol. 158, at p. 305.

clauses, but also lacking their reciprocal character, are the so-called 'open door' clauses, the most important examples of which are to be found in the League of Nations mandate agreements and in the United Nations Trusteeship agreements. The Trusteeship agreement relating to Tanganyika, which is typical, provides that 'the administering authority shall take all necessary steps to ensure equal treatment in social, economic, industrial and commercial matters for all members of the United Nations and their nationals and to this end . . . shall not discriminate on grounds of nationality against nationals of any member of the United Nations in matters relating to the grant of concessions for the development of the natural resources of Tanganyika, and shall not grant concessions having the nature of a general monopoly'.²⁶

Alongside this intervention to obtain the grant of concessions, there has become established a comparable practice with regard to their protection. But we must first consider, as potentially more important from the legal viewpoint, the cases submitted to the Permanent Court of International Justice. In the first of these, however, the *Mavrommatis Case*, the court held that its jurisdiction was based on the Mandate and on the Lausanne Protocol, and only extended within the limits there defined. It eventually upheld a British submission that it had no jurisdiction to hear the case.²⁷ 'Few things can be worse for the dignity of the court', the Attorney-General had argued, 'than that it should find itself involved in trying a multitude of cases which are, in fact, claims by private persons such as are dealt with in the ordinary municipal courts, but which are diverted to this tribunal because it happens that the respondent is a sovereign State and the claimant is a subject of some other power'.²⁸ The court also upheld a French objection to its jurisdiction in the *Moroccan Phosphates Case*.²⁹ The last of the relevant cases, the *Lighthouse Case* between France and Greece, is also not very satisfactory, for although a decision on the merits was given, its basis was once again the Lausanne Protocol rather than customary international law. The dispute concerned the liability of Greece in respect of concessions granted by the Ottoman Empire for the maintenance of lights upon certain coasts of the Turkish Empire which were later transferred to Greece. The court held that the concessions were operative as regards the Greek Government, applying Article 9 of Protocol XII of Lausanne, which read: 'In territories detached from Turkey under the Treaty

²⁶ Art. 9. For a survey of these 'open door' clauses and an analysis of their effects, see *Revue Juridique de l'Union Française*, Vol. 3, p. 276.

²⁷ P.C.I.J. Series A, No. 2.

²⁸ Quoted by Bentwich in 'Concessions in Mandated Territories', 44 L.Q.R. 463.

²⁹ P.C.I.J., Series A/B, No. 74, pp. 10-48.

of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other contracting powers and companies in which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before October 29, 1914, with the Ottoman Government or any local Ottoman authority'.³⁰

More enlightening as to the general law is the arbitral award in the *Barcs-Pakrac Railway Case*.³¹ There a concession had in 1884 been granted by the Hungarian Government relating to territory later transferred to Yugoslavia. The grantee company had leased this concession to an operating company, which had now been taken over by the Yugoslav State. Yugoslavia claimed that changed conditions had rendered the terms of the operating lease, which provided for payment on a gold basis, impossibly onerous, and the award held that she, in her dual capacity of concessionary State and successor to the operating lessee was bound to maintain the main features of the contractual position existing prior to the war, but was not bound to observe literally all the terms of the contract, which needed to be reviewed. In the light of this, it is possible to see the truth of Lauterpacht's statement that whilst this branch of international law is dominated by the principle that the successor State must respect the private rights acquired under its predecessor, it 'offers a particularly good example of a general consensus of opinion in regard to the abstract principle, and a conspicuous lack of agreement in regard to its application'.³²

But as has already been stated, the practice of diplomatic intervention in favour of concessionaries has become established, although such intervention may in some cases have resulted in a submission to the Hague Court or to arbitration.³³ It may be that this practice is to some extent due to the frequency with which so-called 'Calvo clauses' have been inserted into, inter alia, agreements granting concessions, in an attempt to keep such agreements as strictly domestic matters, subject only to the municipal courts of the grantor State. Space does not permit any detailed survey here of the many problems which have arisen as a result of the use of the Calvo clause, nor can justice be done to the wide variety

³⁰ P.C.I.J., Series A/B, No. 71, pp. 94-153.

³¹ *Annual Digest*, 1933-34, Case No. 190.

³² 'The Function of Law in the International Community' at p. 90. For an historical survey of State practice relating to succession and concessions, see Coleman Philipson, *Termination of War and Treaties of Peace*, pp. 321-330.

³³ See, e.g., the Arbitration Protocol between the U.K. and Costa Rica, *Treaty Series*, Vol. 17, p. 151.

of opinions expressed as to the validity of the clause.³⁴ Wide acceptance would, however, be given to the opinion of Oppenheim : 'It is believed that while they may often have the legal effect of ousting the jurisdiction of an international tribunal until the remedies of the local courts have been exhausted, nevertheless the weight of authority is against the validity of so much of a 'Calvo clause' as purports to make an individual renounce the right which International Law confers, not upon him but upon his home State, of protecting him against treatment which contravenes the rules of International Law'.³⁵ There appears to be no unanimity, however, as to the precise nature of the right thus given to the investor's State, nor as to the grounds on which it is based. [A similar result could be achieved by saying that a Calvo clause precludes the investor's State from espousing the investor's contractual claim before an international tribunal, but not any delictual claim arising from a denial of justice, and it is suggested that this would prevent abuses rendered possible by the doctrine set out in Oppenheim. But whatever its effect, the Calvo clause is still a feature of many international transactions. This is clear from the report of the committees of the Havana Conference, at which the Charter from which we have already quoted was drawn up. Chapter VIII of that Charter relates to the settlement of differences between members of the International Trade Organisation concerning the matters dealt with in the Charter, and in particular with situations arising when one member considers that any benefit accruing to it under the Charter is being nullified or impaired in some way by another member.³⁶ If such differences cannot be settled by arbitration, they may be referred to the Executive Board of the Organisation, and ultimately to the International Court.³⁷ But when Article 12 (relating to investment) was being considered in committee, an interpretation of Chapter VIII was accepted which precluded from review under the procedure there outlined any legislative or constitutional requirement existing at the time an investment was made and providing for recourse only to national courts.³⁸

The last type of investment to be considered is private investment—in its most direct form simply the purchase of investment property abroad. But it will in most cases be commercial investment, of course, as is the case where a firm in the lending country opens a branch in the borrowing country. To prevent any attempts

³⁴ See Lipstein, 'The Place of the Calvo Clause in International Law', 22 B.Y.I.L. (1945), p. 130, and the authorities there cited.

³⁵ *International Law*, 7th ed., Vol 1, p. 312.

³⁶ Art. 93.

³⁷ Arts. 94-96.

³⁸ 'Reports of Committees' of the Havana Conference, p. 27.

to stop this process, a clause permitting nationals and companies of one power to carry on business in the territory of another is now to be found in most commercial treaties.³⁹ But the principal problem which this type of investment involves concerns the duty of States in respect of foreign owned property.⁴⁰ Is it contrary to international law for a State to expropriate such property without paying compensation? A discussion of this complicated problem would be outside the scope of this article,⁴¹ but one may ask why a foreign investor should be permitted to demand preferential treatment over nationals. Local conditions made his investment profitable, why should not he later have to accept changed local conditions?

The problem may be further complicated by the use of the corporate device. This may simply mean that a group of investors have obtained incorporation in their home State. But internal legislation of the State where the investment is situated may induce or compel them to obtain incorporation there. In so far as the legal personality thus created veils the foreign character of their investment, this is a disadvantageous step for the investors. In the Peace Treaty with Turkey after the 1914-1918 war, for example, Article 316 (a) and (b) provided that any company incorporated in Turkey which was or should be controlled by allied nationals, might within five years transfer its property, rights and interests to a company incorporated under the law of one of the allied powers, and that such companies should not be subjected to legislative or other provisions, or to taxes, imposts or charges more onerous than those applied in Turkey to companies possessing Turkish nationality. But the fact of incorporation abroad does not always disentitle the investor to the protection of his State, for where necessary the veil of the corporation's personality may be lifted.⁴² In the quotation from the Lausanne Protocol above, we find a reference to 'nationals of the contracting powers and companies in which the capital of the nationals of the said Powers is

³⁹ For a comment on this aspect of recent U.S. treaties, see 43 A.J.I.L., pp. 265-266.

⁴⁰ See Freeman, *The International Responsibility of States for Denial of Justice*, pp. 512-20, and the literature there cited. For an illustration of the problems of private international law arising from confiscations, see Seidl-Hohenveldern, 'Extra-Territorial Effects of Confiscations and Expropriations', 13 M.L.R. 69.

⁴¹ Cf. Fischer Williams, 'International Law and the Property of Aliens', 9 B.Y.I.L. (1928), p. 159, and Fachiri, 'Expropriation and International Law', 6 B.Y.I.L. (1925), p. 159, and Vol. 10 (1929), p. 32. See also *Preparatory Study concerning Draft Declarations on the Rights and Duties of States*, published by the U.N.O.; and for much valuable comment, see the draft declaration and notes in 23 A.J.I.L. Supplement.

⁴² See De Visscher, 'Protection Diplomatique des Actionnaires' in *Revue de Droit International et de Législation Comparée*, Vol. 15, p. 624.

preponderant'. As in so many other cases, investors' rights ultimately depend upon diplomatic intervention.

This situation is, of course, unsatisfactory, but it will only be superseded when there has been developed a more comprehensive body of law. This survey has provided no more than a sketch of what has already been achieved—the writer hopes to undertake at a future date a more comprehensive outline. Investment is so necessary for the fulfilment of the aims of the United Nations Charter that it would be a pity for it to be hampered by an attitude of indifference on the part of international law and international lawyers.

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NOTES

RECENT ENGLISH DECISIONS

Prize: Ship's Flag and Enemy Character

The rule that 'the flag under which a ship sails constitutes one of the most important elements, if not the most important element, which a court of prize has to consider in determining whether she is rightly seized and condemned as prize'¹ was affirmed by the Privy Council (affirming the decision of Lord Merriman P. sitting in Prize) in *The Unitas*.² The *Unitas*, a whale factory ship, was captured in Germany by a British warship and was subsequently formally seized in prize. The ship was registered in the name of a German company and at the date of capture and seizure was flying the German flag. The appellants, Dutch corporations resisting condemnation, contended that they were the beneficial owners of the ship, and it was not disputed that control of the German registered owner was vested in the appellants. Although other points were raised in argument, and were in fact considered by Lord Merriman P., the Judicial Committee specifically limited its decision to the legal consequences of flying the enemy flag.

It was argued on behalf of the appellants that flying an enemy flag was only a prima facie ground for condemnation, and was subject to exceptions which covered the instant case. For some years, debts owing to and trading profits earned by the appellants in Germany had ceased to be freely transferable from Germany, and it was stated by appellants that it was only as the result of a hidden threat by the German authorities that these assets would otherwise be confiscated or rendered valueless that they agreed to build a whaling fleet in Germany for operation under the German flag. Under this agreement the *Unitas* was built and delivered to the German company in whose name she was registered as a German ship. The *Unitas* made a whaling voyage in 1938, and it appeared that after the outbreak of war in 1939, while Holland still remained neutral, the appellants did nothing to dissociate themselves from the activities of their German subsidiaries.

Lord Porter, who delivered the judgment of the Board, rejected the argument of the appellants that the pressures applied by the

¹ [1950] 2 All E.R. 219, 228.

² [1950] 2 All E.R. 219.

German authorities brought the case within an exception to the general rule. Conceding that the German authorities had applied pressures through the threats to the German assets of the Dutch companies, the acts of the appellants were nevertheless not involuntary in the sense of being unintentional. In fact there was a deliberate choice between two distasteful alternatives. 'The fact that she was built as a result of German pressure and German threats, because a worse fate might have befallen the appellants if they did not give way, seems to their Lordships a totally inadequate reason for avoiding the natural consequence of flying the German flag'.³ Nor was it an irrelevant consideration that appellants might have derived considerable profits from the whaling voyage of 1938.

Lord Porter referred to authority which had been cited in support of the proposition that flying an enemy flag was not always conclusive of enemy character. That there might be exceptions was suggested by Sir William Scott in *The Vrow Elizabeth*,⁴ and in *The Tommi*.⁵ Sir Samuel Evans P. had spoken of 'very special exceptions'. In *The Palme* a French Prize Court had ordered the release of a vessel flying the German flag. In that case, the Swiss Red Cross purchased a ship from German owners, and as the Swiss Government would not allow the Swiss flag to be flown, the German flag was retained and a German agent appointed. In *The Taxiarchis*,⁷ a British owned ship registered in Cyprus, which was nominally under Turkish rule though in fact administered by Great Britain, flew the Turkish flag as there was no Cypriot national flag. This was again treated as an exceptional case. In *The Pontoporos*,⁸ a Greek ship was captured by a German warship in the first World War and used as an auxiliary, although the master never consented to her use as such and was kept a prisoner. This case was treated as an exception, and was contrasted with *The Carolina*⁹ where the master, albeit unwillingly, accepted service under an enemy belligerent.

On the authorities, the Judicial Committee, in Lord Porter's words :

'accept the view that there may be circumstances which make the flying of the enemy flag inconclusive as a reason for condemning a ship, but such circumstances must be very exceptional. . . . It is, however, not necessary for their

³ At p. 226.

⁴ (1803) 5 C.Rob. 2.

⁵ [1914] P. 251, 256.

⁶ (1872) Dalloz, *Jurisprudence Generale*, Pt. 3, 94.

⁷ (1913) R.G.D.I.P. XX 518.

⁸ (1915) 1 Br. & Col.Pr.Cas. 371.

⁹ (1802) 4 C.Rob. 256.

Lordships to set exact bounds to the limitations to be placed on the dicta that the flying of an enemy flag is conclusive, or to pronounce on the correctness or otherwise of every decision relied on or the accuracy of every individual expression of opinion contained therein'.¹⁰

It appears from the cases cited that the scope of the exception, although not specifically marked out by the Judicial Committee in the instant case, is very narrow. Following the decision in *The Unitas*, it seems very unlikely that economic threats or pressures will be a ground for invoking the exception.

Recognition of Foreign Governments—Limited Retroactive Effect

The rule of retroactivity of recognition of States and governments as enforced in British and American courts, is that recognition once granted is deemed to date back to the actual commencement of the activities of the recognised authority. Observing that 'In principle, there is little to be said for treating as legally effective legislative acts performed at a time when the authority in question was, in the view of the non-recognising State, a mere instrumentality of power',¹ Oppenheim describes the rule as one 'of convenience'.² The rule, which has been adopted with regard to duties as well as rights, facilitates the preservation of legal continuity and thus safeguards the interests of those who have had dealings with the newly recognised authority's predecessor. At the same time it avoids the hindrance to the establishment of friendly relations between the recognising State and the newly recognised authority which would tend to result from the former's insistence on continuing to regard the latter's pre-recognition acts as complete nullities.³

The rule of retroactivity being based on demands of convenience and expediency, its applicability is limited by the extent of these demands in any particular case. 'There has been no hesitation to abandon that principle of convenience when it was opposed by more cogent considerations. Thus it has been held by the Supreme Court of the United States [in *Guaranty Trust Company of New York v. United States*⁴] that the principle of retroactivity was not applicable to transactions in the United States between American nationals and the predecessor of the newly recognised government.

¹⁰ [1950] 2 All E.R. 219, 227, 228.

¹ Oppenheim, *International Law*, 7th ed., Vol. 1, p. 145.

² *Ibid.* p. 144.

³ See *United States v. Pink* (1942) 315 U.S. 203 as an example of perhaps excessive regard being paid to this consideration.

⁴ (1938) 304 U.S. 126.

To hold otherwise would have meant to frustrate legitimate expectations of persons who relied, as they were entitled to do, on the fact that their government continued to recognise, for a time, the predecessor of the authority newly recognised'.⁵ Words of Stone J. delivering the judgment of the Supreme Court were cited with approval by Cohen L.J. in the recent Court of Appeal (Bucknill, Cohen and Denning L.JJ.) decision in *Boguslawski and Another v. Gdynia Ameryka Linie*.⁶ There, the defendant company contended that the recognition by the British Government of the Polish Provisional Government of National Unity at midnight on July 5-6, 1945, operated retroactively to June 28, 1945—the date of that authority's establishment in Poland. Success in this contention would, the defendants argued, have facilitated avoidance by the new Government, of obligations to the plaintiffs undertaken by the 'old' Polish Government on July 3 and/or July 5. The decision turned on the defendants' failure to establish retroactivity. The wording of the British Foreign Secretary's certificate on the point was scarcely equivocal. Paragraph 1 of the certificate was as follows:

'1. Up to and including midnight of July 5-6, 1945, His Majesty's Government in the United Kingdom recognised the Polish Government having its headquarters in London as being the government of Poland, and as from midnight of July 5-6, 1945, His Majesty's Government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish Government having its headquarters in London as being the government of Poland'.

Cohen L.J. pointed out that although whether and to what extent recognition is retroactive was a matter of law for the court, the facts as to the effect of recognition in the instant case were 'decisively' settled by the Secretary of State's certificate. The learned Lord Justice went on, however, to consider the scope of the principle of retroactivity. Even if (a situation which the Foreign Secretary's certificate precluded) the principle of retroactivity was operative to the full extent of its usual and proper limits, the defendants' contention would not have succeeded. Although recognition is given retroactive effect on grounds of expediency and convenience, powerful considerations of the same sort demand that recognition should not undo previous recognition. To allow the rule of retroactivity to prevail at the expense of these considerations would mean that the very *raison d'être* of that rule, the preservation

⁵ Lauterpacht: *Recognition in International Law*, p. 60.

⁶ [1950] 2 All E.R. 355 at pp. 364-5.

of legal continuity, would be undermined. The apparently conflicting requirements of convenience must be reconciled by distinguishing between the effects of recognition in respect of the newly recognised authority's pre-recognition activities in territory under its *de facto* control, and the effects of recognition on pre-recognition transactions entered into outside the *de facto* control of the newly recognised authority by its predecessor. In the former case recognition is retroactive. In the latter it is not: 'If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals⁷ in carrying them on. So far as we are advised no court has sanctioned such a doctrine'.⁸

P. B. CARTER.⁹

The decision of the Court of Appeal in *Kenward v. Kenward* [1950] 2 All E.R. 297, will be discussed in the January, 1951, issue of the I.L.Q.

RECENT AUSTRALIAN DECISIONS ON PRIVATE INTERNATIONAL LAW

Legitimation

Dr. Falconbridge, in a case comment, published in 1937 and reprinted as chapter 37 of his Essays, submitted for discussion a question arising from the Legitimacy Act, 1926 (Eng.) as suggested by the decision of the Full Court of Victoria in *Re Williams*.¹ Curiously, the problem there raised has attracted little, if any, attention in England, despite its wider bearing on various aspects of the conflict rules applicable to legitimation. It merits further reflection, however, by reason of its inherent importance, the further accumulation of Australasian case law and the lengthening shadow thrown on this topic by the controversial ruling of the Court of Appeal in *Re Luck*.²

⁷ Or aliens, at least if they are enjoying the protection of the British Crown (see Cohen L.J. at p. 364), and it would seem on principle, any aliens, provided of course that they are not under the *de facto* control of the subsequently recognised authority.

⁸ *Per* Stone J. in *Guaranty Trust Co. v. United States*, 304 U.S. 126 at p. 140 cited with approval by Cohen L.J. [1950] 2 All E.R. at p. 365.

⁹ Fellow of Wadham College, Oxford.

¹ [1936] V.L.R. 223.

² [1940] Ch. 864.

The Legitimacy Act, 1926, s. 1 (1) contains two quite separate provisions, the distinct nature of which has been somewhat obscured by the structure of the section itself. In effect, it (a) introduced into English municipal law the principle of legitimation by subsequent marriage where the parents of an illegitimate person marry after the commencement of the Act, and (b) it legitimated by its own force all persons whose parents had married prior to that date, provided the father, in case (a) is, or in case (b) was, domiciled in England at the date of the marriage. It is evident that, in respect of a marriage by the parents prior to 1927, the case is not one of legitimation by subsequent marriage at all, but of legitimation conferred by statute on a class of persons by reference to a marriage and the domicile of the father at such time.

In several jurisdictions outside England, a decision has been called for to determine whether, in relation to the estate of a domiciliary of such law district, be it a case of succession under a will or intestacy or of an application under the various statutes corresponding to the Inheritance (Family Provision) Act, 1938, a person can establish a title whose parents were married prior to 1927 and who has been legitimated in England by force of the Legitimacy Act, 1926, but whose father was either dead at the date of the commencement of that Act or, being domiciled in England at the time of the child's birth and marriage, had in the meantime lost that domicile. In the law districts in which these questions have arisen the statutory abolition in England of the *Wright-Grove* rule had either not been adopted or was not yet in force in relation to the case in hand. Even if, however, the new English conflict rule had been available, its relevance would in all probability have been negatived since it is extremely doubtful whether the *de cuius* could in these circumstances claim to have become legitimated 'by virtue of such subsequent marriage' rather, as already indicated, are we concerned here with legitimation 'by virtue of statute' in respect of which *Re Luck* appears to preclude any reliance on s. 8 (1) of the Legitimacy Act, 1926. It is for this reason that certain points now under discussion may well arise with equal poignancy before English courts concerning persons who rely on legitimation under the law of those 'foreign' states, such as Eire, which have adopted the English Act in its totality (except for a substitution of the appropriate domicile).

The line of relevant cases commenced with the decision by Cussen J. in the *Estate of Beatty* (1919)³ that a person born prior to his parents' marriage was not entitled as a 'brother's child' to

³ [1919] V.L.R. 81.

a share in the estate of a Victorian intestate who died in 1911, despite the fact that his parents were at all material times domiciled in the state of New York which in 1895 had by statute retrospectively legitimised all children whose parents had subsequently married. The father of the claimant, however, had died in 1870, *i.e.*, before the coming into force of that Act. The ground for Sir Leo Cussen's conclusion was that 'at any rate for the purpose of the Statute of Distribution the relationship of lawful children must have been established during the lifetime of the parents, or at all events of the father of the children'. This statement might have justified the inference that the decision depended on the construction of the Statute of Distribution as a matter for the *lex successionis*, *viz.*, that capacity to take on intestacy is conditional on legitimacy at the date of the father's death,⁴ were it not for the more far-reaching proposition found in a subsequent passage of the judgment that, since domicile affords the connecting link determining the status of all children who might be affected by the event which confers legitimacy, that point of reference is unavailable where the person whose domicile is the appropriate criterion is dead, since *ex hypothesi* at the date of what is alleged to be the legitimating event, he has no domicile. In *Re Williams* (1936)¹ the Full Court applied this decision to the case of a person who relied on the English Legitimacy Act, 1926 without success because his father, though domiciled in England at the date of the child's birth and his own marriage, had died prior to 1927. Although two of the three judges ventured the opinion that for purposes other than succession on intestacy the claimant might be regarded as legitimate, Gavan Duffy J. in *Re James* (1942)⁵ found himself unable to depart from the earlier precedents when seised of a claim to a legacy bequeathed to the testator's 'nephews and nieces'. In this and the other cases to be mentioned presently, the issue for adjudication was regarded as raising simply a question of status on the principle of *Re Goodman's Trusts*,⁶ uncomplicated by the current controversy as to respective spheres of succession and status in suits of this nature.

It is difficult to refrain from sympathising with Gavan Duffy J.'s distaste for the conclusion established by these Victorian cases. Indeed, they deserve condemnation not only for their evident injustice but also for the reasoning which they warrant for support. It must be conceded that legitimation affects the status of both child and parent, but sufficient weight is

⁴ *Cr. Birtwhistle v. Vardill* (1835) 2 Cl. & F. 571; [1939] 7 Cl. & F. 895.

⁵ [1942] V.L.R. 12.

⁶ (1881) 17 Q.B.D. 260.

accorded to that principle in the rule that the legitimating event must have derived its force from the law of the father's domicile. To go beyond this point and deny the possibility of legitimation whenever the putative father had predeceased that occurrence, seems a conclusion which is an undue restriction on the extra-territorial recognition of a foreign status and unsupported by any compulsive dictate of policy. It is at best a mechanical application of the *Wright-Grove* rule which had not been formulated with a view to the precise situation presented in these cases, and illustrates the impropriety of accepting in the judicial process any legal proposition, representing an *ad hoc* ruling applied to a particular set of facts, as an obligatory major premise of a syllogism, without re-examining the underlying reason and ascertaining the necessary limitations of the rule in question. No violence to established principle would have been perpetrated by holding that a person claiming legitimation by virtue of a statute passed in the country where the father was domiciled at the date of the child's birth and his own death, if the statute was passed after that event, ought to be entitled to the recognition of his status in other jurisdictions. This suggestion, indeed, corresponds to the decision of the Irish court in *Re Hagerbaum* (1933),⁷ although the briefly reported judgment does not show that Meredith J. was cognisant of the line of reasoning which had commended itself to the Victorian court in the *Estate of Beatty*.

A novel, and even less acceptable, approach to the instant problem was recently ventured in *Public Trustee v. Wilson* (No. 2) (1948).⁸ Without repudiating the actual decision in the earlier cases, the Master in Equity condemned the argument there adopted and preferred to rest his conclusion squarely on the authority of *Re Luck*. He held that the status of legitimacy conferred on the claimants by the English Act of 1926 could not be recognised in New South Wales because 'neither at the time of the respective births nor at the time of marriage did the law of England permit of legitimation by subsequent marriage nor indeed by any other means'. This judgment, it is submitted, discloses so unreasoned an application of what is conceived to be the *Wright-Grove* rule as to be devoid of any merit. Despite the ambiguity inherent in the usual formulation of that principle, there can be no justification for the suggestion that the relevant criterion determining legitimation is the law as at the time of birth and subsequent marriage in force in the country of the father's domicile. It is true that occasionally the necessity for having

⁷ [1933] Ir.R. 198.

⁸ 65 W.N. (N.S.W.) 234.

regard to the law of domicile at the date of birth has been referred to in terms of the child's capacity for subsequent legitimation, but the instant arid application of that test in effect leads to the inevitable non-recognition of *all* forms of statutory legitimation, despite the repeated judicial approval of Dicey's affirmative conclusion in cases where the relevant statute was enacted in the country in which the father was domiciled at the two relevant dates.⁹ It is further open to attack on the subsidiary ground that English law has always permitted legitimation by the very means on which reliance was placed on this occasion, *viz.*, by statute.

In contrast, the somewhat related problem raised in *Re Davey* (1937)¹⁰ and *Re Pritchard* (1940)¹¹ has found adequate solution. In these cases the father of the claimant was still alive at the commencement of the Legitimacy Act, 1926 but, though domiciled in England at the time of birth and marriage, had acquired a domicile of choice in New Zealand and New South Wales respectively when that statute came into force. Although the operation of the Act *in England* is dependent only on an English domicile at the time of marriage, even in respect of marriages preceding 1927, this feature which is presumably due to faulty analysis by the draftsman, cannot prevent a foreign court from testing the status of the claimant, in applying the decision of *Re Luck*, by reference to the father's domicile at the times of birth and the legitimating event. Thus in the case of statutory legitimation by reference to an antecedent marriage, the domicile at the date of marriage is neither an essential criterion nor an adequate substitute for the domicile as at the passing of the statute so far as the conflict rules of the *lex fori* are concerned; although, of course, in order to rely abroad on the Legitimacy Act, 1926 in these circumstances, all three dates are relevant, since the operation of that statute depends itself on an English domicile at the time of marriage.

In conclusion, I cannot omit to record my disagreement with the critical comment in the new edition of *Dicey*¹² that the 'Australian decisions appear to rest on a strict application of the foreign *lex successionis*: it can hardly be doubted that both s. 1 (1) and s. 8 (1) apply, even though the child's parents or either of them may have died before 1927'. As already pointed out, the decisions, however unmeritorious for the reasons suggested, are based on a

⁹ 6th ed., p. 506.

¹⁰ [1937] N.Z.L.R. 56.

¹¹ 40 S.R. (N.S.W.) 443.

¹² At pp. 509-510.

'strict' application of the conflict rules of the forum, not on the municipal rules of the *lex successionis*; and it is surely immaterial from the point of view of the foreign court that, for purposes of English internal law, the Act of 1926 confers legitimation irrespective of the date of the father's death or of his domicile at the commencement of the Act, if the court's conflict rule selects these elements as determinative of the claimant's status.

J. G. FLEMING.¹³

RECENT SOUTH AFRICAN DECISIONS ON PRIVATE INTERNATIONAL LAW

Succession or Administration?

English law regards the postponement of sale of assets in a deceased estate which fall within the purview of an English grant of administration, as a question not of succession, but of administration, and thus governed by English law as the *lex fori* (*Re Wilks* [1935] Ch. 645; Dicey, *Conflict of Laws*, 6th ed., p. 813; Cheshire, *Private International Law*, 3rd ed., p. 672). An analogous issue arose in Southern Rhodesia (where Roman-Dutch law prevails) in *Ex p. Bonakis* 1950 (1) S.A.L.R. 838 (S.R.). A testator died domiciled in the Belgian Congo, leaving a will in all respects valid by the law of that country. In Southern Rhodesia he left assets consisting of shares in two companies incorporated in that colony. Application was made to the High Court of Southern Rhodesia for an order directing that the shares be not realised but retained for the benefit of the minor heirs. Creditors in Southern Rhodesia apparently would not be affected by the issue of the order. Tredgold J. (as he then was) in a short judgment held that the court should, and would, not entertain the application until it was clear that the Congo courts would not exercise jurisdiction in the matter. The following passage from the judgment is of interest:

' . . . the distribution of the estate is essentially a matter for the courts of the domicile of the testator and of his minor heirs [sic]. This appears from the authorities to which [my attention has been] directed . . . but it also appears to me right in principle. In these matters where there is a possible conflict of jurisdiction it seems to me most important that this court should not assume a jurisdiction which is the proper function under private international law of the courts of another country'.

It appears from the above that the learned judge unconsciously characterised the issue as one relating to succession; on this conclusion he preferred to leave the *forum ultimi domicilii* of the

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deceased to deal with the matter, which seems to accord with the views expressed in *Dicey* (p. 312, n. 2). (Incidentally, by declining to exercise jurisdiction in these circumstances, Tredgold J. avoided having to consider and apply the foreign *lex domicilii* which governed the issue as he characterised it.) It will be observed, however, that the court impliedly accepted the view that the Southern Rhodesian Court, as the *forum rei sitæ*, also had jurisdiction, which again is in accordance with the prevailing belief (*Dicey*, Rule 51, p. 312; Pollak, *The South African Law of Jurisdiction*, pp. 137-8, is of opinion that the *forum rei sitæ* should have exclusive jurisdiction, on the ground that it alone can give an effective judgment).

It is in regard to the characterisation of the question in issue that *Ex p. Bonakis* gives least cause for satisfaction. It seems to the writer that the matter concerned administration *stricto sensu*, not succession; that therefore the Southern Rhodesian Court as the *forum rei sitæ* (and the court where the foreign executor was—or should have been—granted letters of administration) had exclusive jurisdiction, and should have applied its own law (*Dicey*, Rule 49, p. 301, and Rule 176, p. 811; Pollak, *loc. cit.*). Assuming that Southern Rhodesian law permits of orders such as the one sought, the court, had it thought fit to grant the application, could have inserted adequate safeguards in its order to ensure that creditors in the Belgian Congo would not be prejudiced if the assets collected by the personal representative of the deceased in the Congo were not sufficient to meet their claims.

Domicile of Choice of Alien Resident Under a Temporary Permit

In *Gwambe v. Gwambe* 1950 (2) S.A.L.R. 643 (T.P.D.), the Transvaal Provincial Division held that 'a person residing in a foreign country on sufferance can acquire a domicile in such country'. The case is on all fours with *Fenner v. Fenner* 1943 S.R. 188, and similar to *Joosub v. Salaam* 1940 T.P.D. 177. The *propositus* was physically present in the Transvaal with the avowed intention of remaining there for the rest of his life. But he was permitted to reside in the province only on a temporary permit, which could be withdrawn at any time at the discretion of the Union authorities. The court purported to follow *Boldrini v. Boldrini* [1932] P. 9, and *Joosub v. Salaam*, and held that the *propositus* was domiciled in the Transvaal. If further authority for the court's conclusion were required (and better authority than *Boldrini's Case*), there are the English decisions of *May v. May* [1943] 2 All E.R. 146, *Cruh v. Cruh* [1945] 2 All E.R. 545 (each

of which goes even further than the instant case), and *Zanelli v. Zanelli* [1948] W.N. 381.

It is submitted that all the above-mentioned cases, save *Boldrini v. Boldrini*, have been wrongly decided. It is believed that this rather bold assertion can be substantiated. *Boldrini's Case* really established nothing more than that a person who may lawfully reside in a country as long as he pleases provided he does not commit one of a list of scheduled offences, can acquire a domicile there. Now here the *animus manendi* (even in the sense of Voet's positive *propositum illic perpetuo morandi*) can be legally carried into effect. It rests in the power of the *propositus* himself, and is not left to the discretion of the authorities. Surely in the other cases cited above the intention to remain for ever cannot exist, since it may be frustrated at any time by the executive. To hold that a domicile of choice can be acquired under these circumstances is to hold that 'domicile of choice, [although] based on the intention to remain permanently in this country, is . . . not affected by the fact that it may be highly improbable that this intention can be carried out . . . in the matter of domicile hope triumphs over expectation' (Note on *Cruh's Case* in 62 L.Q.R. (1946) 11-12).

Some support for the contention that a person resident in an area under temporary permit cannot acquire a domicile of choice there can be found in the South African cases, and it is significant that Millin J., in a recent case, left open the question 'whether a prohibited immigrant who enters or remains in the Union under a temporary permit can acquire a Union domicile' (*Shumba v. Pieterse*, N.O. 1950 (2) S.A.L.R. 646 (T.P.D.) at 652).

ELLISON KAHN.⁹

SCOTTISH RECOGNITION OF A FOREIGN DIVORCE DECREE

Perrin v. Perrin,¹ decided by Lord Sorn in the Outer House of the Court of Session, raised three questions connected with the recognition of foreign divorces. The petitioning wife, who was domiciled in Scotland before her marriage to an American soldier, had been the respondent in an undefended suit for a divorce brought by the husband in Idaho on the ground of mental cruelty. In order to test the international validity of the divorce, she brought a petition for a divorce in Scotland on the ground of her husband's adultery.

⁹ Senior Lecturer in Law, University of the Witwatersrand, Johannesburg, South Africa. Mr. Kahn will discuss the advisory opinion of the International Court of Justice on the International Status of South-West Africa in the January, 1951, issue of the I.L.Q.

¹ 1950 Sc.L.T. 51.

The petition was brought in virtue of the Matrimonial Causes (War Marriages) Act, 1944, which, in the circumstances, conferred jurisdiction upon the Scottish court. The petitioner alleged that the foreign decree could not be recognised in England for the reason that the husband was not domiciled in Idaho, that mental cruelty was not recognised as a ground for a divorce in England, and that the decree had been obtained by fraud. The court rejected these reasons and held that the decree of the court in Idaho must be recognised in Scotland.

(1) The court rejected the contention that the Idaho court was incompetent on the ground that the husband's domicile was in the State of Washington. It did so by referring to *Armitage v. Att.-Gen.* [1906] P. 135. According to the principle there laid down it is sufficient that the decree of divorce is recognised by the courts of the husband's domicile. The Scottish court, without hearing any evidence, held that it was common knowledge that courts in the United States recognise divorces decreed in other jurisdictions within the United States. The principle in *Armitage v. Att.-Gen.* is probably too well established to be questioned,² but it is still necessary to determine, in the first place, where the husband was domiciled at the time of the divorce. In the present case it was clear that he was either domiciled in Idaho or Washington. Since the Scottish court accepted as a fact that the courts in Washington would recognise the Idaho divorce, it was unnecessary to determine where the husband was in fact domiciled. If it had been necessary to do so, the court would have had to determine a point of law which has attracted little attention. The husband's domicile of origin was Washington but, while he was an infant, his father moved to Idaho, where the son remained until he went overseas either shortly before or after he came of age, and where he returned after war service. Unless it could be assumed that he had thus acquired a domicile of choice in Idaho, the question would have been whether a child's domicile of origin can be changed during his infancy as a result of a change of domicile of his father, with the result that the child acquires a domicile of choice during infancy.³ Having regard to the well-known principles of jurisdiction in divorce applicable in courts in the United States, the assumption, by the Scottish court, of the power to determine a point of foreign law (*i.e.*, whether the courts in Washington would recognise divorces in Idaho) may be justified in practice, but it is not without danger.

² But see Morris in *Canadian Bar Review* 24 (1946), p. 73.

³ Compare Dicey, *Conflict of Laws*, 6th ed., p. 88, Rule 6; *Sharpe v. Crispin* (1869) L.R. 1 P. & D. 611, 617.

In the absence of any proceedings in Washington impeaching the validity of the divorce in Idaho in accordance with the rule in *Williams v. North Carolina*,⁴ there was no reason to examine the validity of the particular decree before the court.

(2) The objection that mental cruelty was not a ground for a divorce in Scotland and that, in order to be recognised in Scotland, a foreign decree of divorce must be based upon grounds similar to or identical with those recognised by Scots law, was disposed of by reference to the practice to the contrary in Scotland⁵ and England.⁶ As the law stands, foreign decrees are treated as valid if obtained in a court of competent jurisdiction, which is the court of the domicile of the husband. It is irrelevant that the grounds for a divorce abroad may differ from those recognised in England, provided always that they are not contrary to English public policy.

(3) As regards the objection that the Idaho decree had been obtained by fraud, inasmuch as it was alleged that the pleadings were untrue, that the husband's evidence was false, and that he had procured a witness to give false evidence, Lord Sorn adopted the well-established distinction between intrinsic fraud and fraud which is extrinsic to the proceedings, and held that only the latter justified non-recognition both of domestic and of foreign decrees. Thus the first two objections were dismissed as irrelevant, and only the third objection had to be considered. Lord Sorn admitted that subornation of perjury would be a ground for refusing to recognise a judgment *in personam*, but held that, as regard judgments *in rem*, based upon the exclusive jurisdiction of the courts of the domicile and of that of courts whose jurisdiction is recognised by the courts of the domicile, only such extrinsic fraud as is designed to mislead that court into assuming jurisdiction was sufficient to warrant a refusal to recognise the foreign judgment *in rem*. In so far as divorce decrees are concerned, this view is supported by considerable authority⁷ and deserves full approval, seeing that it reduces the possibility of re-opening foreign divorces other than in the court which gave the original decree.

K. LIPSTEIN.⁸

⁴ (1942) 317 U.S. 287; (1945) 325 U.S. 226.

⁵ *Humphrey v. Humphrey's Tr.* (1895) 33 S.L.R. 99; *C. D. v. A. B.* 1908 S.C. 737, 739 n.

⁶ *Harvey v. Farnie* (1882) 8 App.Cas. 43; *Pemberton v. Hughes* [1899] 1 Ch. 781; *Bater v. Bater* [1906] P. 209; *Pastre v. Pastre* [1930] P. 80, 82; *Mezger v. Mezger* [1936] 3 All E.R. 130; Dicey, *Conflict of Laws*, 6th ed., p. 369 and note 8.

⁷ *Bater v. Bater* [1906] P. 209, 218, 228; *Vardy v. Smith* (1932) 48 T.L.R. 661, 663; (1933) 148 L.T. 124, 126 (C.A.); *Crowe v. Crowe* (1937) 157 L.T. 557; *Bonaparte v. Bonaparte* [1892] P. 402, 400; Dicey, *Conflict of Laws*, 6th ed. 1949, pp. 370 and note 14; pp. 393-394.

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IMMUNITY OF FOREIGN SOVEREIGN STATES. EFFECT OF BELLIGERENT
CONFISCATORY MEASURES IN NON-BELLIGERENT STATES ¹

In the course of a lawsuit which concerned questions of Trade Mark Law and the Law against Unfair Competition, the Austrian Supreme Court as the court of last instance has dealt with important problems of International Law. The conclusions arrived at by the Austrian court in the case under review seem to me noteworthy, particularly in view of the discussion which followed the decisions of the English Court of Appeal in *Krajina v. The Tass Agency and Another* ² and in *Dollfus Mieg Compagnie S.A. v. Bank of England*.³

For the purpose of the present report it might suffice to refer to the facts quite briefly. Georg Dralle, Parfümerie- und Feinseifenwerke, in Hamburg-Altona, had founded a branch in Bodenbach in 1910. This place was then in the territory of the Austrian-Hungarian Monarchy, but after the war of 1914-18 became a part of the Republic of Czechoslovakia. The business in Bodenbach, the Czech name of which is Podmokly, was expropriated in 1945 by the Czechoslovak Government as German property, and was converted into a nationalised enterprise run by Czechoslovakia under the description of 'Jiří Dralle, národní správa, Podmokly'. Trade marks had been registered for Georg Dralle, Hamburg-Altona, and for Jiří Dralle, Bodenbach, in Austria as well as internationally under the Madrid Agreement concerning international trade mark registration. The Austrian agent of Georg Dralle, Hamburg-Altona, Hans Hoffmann, who had acted as their representative for a number of years, commenced an action in the Commercial Court, Vienna, against Jiří Dralle for unfair competition and asked for an injunction restraining the defendant from using certain trade marks in Austria. Whereas the Commercial Court granted that injunction the Court of Appeal at Vienna allowed the defendant's appeal. On the plaintiff's appeal the Supreme Court restored the decision of the court of first instance.

Apart from interesting questions on the Austrian and International Law of Industrial Property which had to be decided by the court there arose two problems of International Law in general which seem to me to have been dealt with in a highly satisfactory manner.

1. The Supreme Court started from the viewpoint that the defendant was the Republic of Czechoslovakia as the owner of the

¹ *Hans Hoffmann v. Jiří Dralle, národní správa Podmokly* (Austrian Supreme Court, May 10, 1950, 1 Ob 167/49 and 1 Ob 171/50).

² [1949] 2 All E.R. 274.

³ [1950] 1 All E.R. 747.

See P. B. Carter, 3 I.L.Q. pp. 78 *et seq.*, and 410 and *seq.*

business in question. The court pointed out that it did not matter that the Republic of Czechoslovakia traded as described above because that description indicated only the name under which the business was carried on without any separate legal entity being created thereby. The court held the defendant to be a Government department just as had been ruled in the *Tass Agency Case* by Birkett J. in the King's Bench Division and by the learned Lord Justices in the Court of Appeal. The court had, therefore, first of all to decide whether it had jurisdiction to deal with an action against a foreign sovereign state. In this respect it was decisive whether foreign states are exempt from jurisdiction abroad and enjoy immunity generally or only in so far as 'acta imperii' are concerned so that immunity does not apply with regard to 'acta gestionis'; acts done in the course of commercial activities.

(a) The Supreme Court first surveyed the law of jurisdiction in Austria and pointed out that it had not followed a wholly consistent pattern. Until the beginning of this century Austrian courts had acknowledged state immunity without any restriction, but this rule was departed from and for about twenty years the Austrian courts have restricted the principle of immunity to 'acta jure imperii' and have assumed jurisdiction, e.g., if the action concerned the activity of a foreign state as a railway-owner (decision of December 17, 1907), or if moneys were claimed from the Ottoman state for repair work carried out at the Palace of the Ambassador in Vienna (decision of January 5, 1920). Some later decisions reverted to the former practice and recognised state immunity generally, except where the foreign state subjected itself to the jurisdiction or if immovables in Austria were concerned (decisions of January 20, 1926, June 14, 1930, and September 17, 1947).

(b) As under the Austrian Constitution the generally acknowledged rules of the Law of Nations (*jus gentium*) form a part of Austrian International Law, the Supreme Court had also to consider the jurisdictional rules in various countries with regard to the principle of immunity. The court distinguished between two groups of states. In the first group, to which the United Kingdom,⁴ the United States, Czechoslovakia, France, Germany

⁴ In this connection it should be noted that in the *Tass Agency Case* Singleton L.J. expressed the hope that radical modification of the principle of immunity might be considered in the near future. P. B. Carter (3 I.L.Q. p. 86) in reviewing this case and the *Dollfus Mieg Case* emphasises, 'the need for a modification of the Anglo-American rigid adherence to the standpoint that immunity should be granted to a sovereign state regardless of the nature of the activities in respect of which it is claimed'; and the learned writer seems to me perfectly right in adding that 'the wider the incidents of the immunity, the more circumspect we should be in granting it'.

and Poland belong, state immunity is granted irrespective of the nature of the state activity. The court then referred to the other group of states which recognises such immunity only with regard to acts of sovereignty, 'acta imperii'. The court reviewed a great many decisions delivered in various countries to that effect, starting with a decision by the Cour de Cassation in Naples in 1886, and dealt very extensively with the jurisdiction of the Federal Court of Switzerland, the decision of which, dated March 13, 1918, exposes the problem in a particularly lucid manner. The Austrian court showed that the courts in many other countries (Belgium, Egypt, Czarist Russia, etc.) have followed suit.

(c) The Supreme Court further pointed to the proposals in the so-called Codex Bustamente (Arts. 134, 135), to the debates at the conference of the International Law Association in Vienna (1926), to the Harvard draft of 1932 (Art. 11) and to the opinions expressed by writers, the majority of whom appear to adhere to the principle that immunity should not be granted to state activities of a clearly non-governmental nature.

After having considered that problem from all sides the Supreme Court arrived at the conclusion that there exists at present no generally recognised principle of absolute state immunity so that the court was not bound by such a principle. The court then emphasised that nowadays—contrary to earlier practice—many states embark upon activities of a purely commercial nature so that to grant unrestricted immunity would be against the requirements of the present time. The Court, therefore, ruled that it had jurisdiction in the case submitted.

Decisions of Austrian courts are not considered to be precedents. But in order to secure uniformity of jurisdiction as much as possible the Supreme Court—and that court only—is entitled under Austrian law to order entry of a legal rule—on which a decision is based in an individual case—in a Book of Precedents (called 'Spruch-repertorium'). Such entry has the effect that another senate of the Supreme Court cannot deviate from that rule unless a senate consisting of 15 members of the court so decides, and a decision arrived at by such a senate can be altered only with the concurrence of 21 members of the Supreme Court. The decisions reached in such a manner are not legally binding upon other courts but in fact they are always observed by all the Austrian courts.

In the present case the court ordered the entry of the following rules :

- (i) foreign states are under the *Law of Nations* exempt from the jurisdiction of Austrian courts in so far only as acts are

concerned which have been done in the exercise of sovereign power ;

- (ii) under the *internal* Austrian law as well foreign states are subject to Austrian jurisdiction in all controversies arising from matters of private law ('in allen Rechtsstreitigkeiten aus Privatrechtsverhaeltnissen').

2. The second problem with which the Supreme Court concerned itself was the question of the effect of war measures taken by a belligerent state in non-belligerent countries.

(a) The Supreme Court first considered the question whether the confiscation (nationalisation) of property owned in Czechoslovakia by persons of German nationality was legal under Czechoslovakian Law and answered this question in the affirmative in view of the respective decrees issued by the State President.

(b) The court then considered whether such a measure was permissible under the Law of Nations, but argued that it was not necessary to decide this question as in any case war measures had no effect in non-belligerent states. The court reviewed decisions delivered in various states and concluded that the opinion arrived at by the court was in agreement with the standpoint taken by the courts in many other states and nearly unanimously in the textbooks.

The court argued that Austria was not a belligerent state but was drawn into the war as a victim of other powers so that the confiscation of German assets in Czechoslovakia did not affect assets situated in Austria. The conclusion reached by the court is in agreement with previous decisions delivered by Austrian courts in the sense that confiscatory measures taken by other states are without effect with regard to assets in Austria.⁵

The court stressed that its opinion was not in any way in disagreement with the Potsdam Resolutions of August 2, 1945, as the latter did not provide that the states occupied by the Allies were bound to grant extra-territorial effect to confiscatory measures or measures of liquidation taken in any of the Allied states, so that Austria was under no obligation to confiscate German property.

It is my submission that the conclusions reached by the Supreme Court are to be welcomed in every respect.

PAUL ABEL.⁶

⁵ A summary of the Austrian jurisdiction in this field of Law is given by Seidl-Hohenveldern, *Österreichische Juristen-Zeitung*, 1949, p. 410 and p. 533 *et seq.*

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INTERNATIONAL BAR ASSOCIATION CONFERENCE—LONDON, 1950

The Third International Conference of the Legal Profession sponsored by the International Bar Association met in London on July 19, 1950. The proceedings which continued until July 26, were attended by some 660 members of the legal profession from thirty-eight countries. A wide variety of legal topics was discussed in the course of the meetings.

Of particular interest to international lawyers was the presentation of a report of the work of a commission set up jointly by the International Bar Association and the International Association for Penal Law. This report, which was introduced by Mr. E. van Saher, proposed a United Nations system of international criminal law administration. It was suggested that a code of defined offences be prepared, and that international criminal courts should be set up with uniform rules of procedure to be convened wherever and whenever the United Nations might determine. Colonel McClure of the United States proposed that such courts should be manned by neutrals, should be permanent and set up before the commission of the offences which they were to try, and should be armed with proper rules of evidence. The speaker indicated his preference for the Anglo-American rules of evidence. The meeting passed a resolution referring the subject back to the commission for further study of the problems involved in the establishment of a permanent international criminal court. At another meeting, a resolution was passed recording the earnest desire of the International Bar Association to make the fullest contribution for forwarding the Charter of the United Nations in the cause of Human Rights, and requesting the executive council to set up a committee to study the best means of achieving this.

The Attorney-General, Sir Hartley Shawcross, who was unable to attend the meeting, put before it a paper on the constitutional structure of the United Nations. The main defects in the United Nations structure preventing the achievement of rapid and wise decisions were the veto and the principle of one State, one vote. The veto was not a structural defect, but its abuse by the U.S.S.R. was the result of an international situation which would have paralysed any international security organisation however perfectly constructed. As for the one State, one vote principle, it was not practicable to provide an alternative. Resolutions passed by the conference included a recommendation that studies should be made of possible improvements in the constitutional structure of the United Nations in respect of the voting system, delineation of the area of powers and rights, the development of an authoritative

method of declaring and amending international law, the allocation of all judicial functions to the judicial organs of the United Nations, and the clarification of the areas of permissible self defence and authorised regional arrangements.

CHINA AND THE SECURITY COUNCIL

The Republic of China is a Member of the United Nations and a permanent Member of the Security Council.¹ Article 28 (1) provides that 'each Member of the Security Council shall . . . be represented at all times at the seat of the Organisation'. These provisions for representation are expanded in Rules 13-17 of the Council's Provisional Rules of Procedure, under the heading of credentials and representation, which will now be considered in turn.

It is submitted that in the credentials of representatives to the Security Council there are four elements, two formal and two essential, which fall to be considered when a decision upon the validity of the credentials has to be taken. The formal elements are the authenticity of the credentials, and the identification of the holder: the credentials must be authentic in that they have been in fact issued by the authority purporting to issue them, and they must identify the individual who presents them, as the holder. The essential elements are the powers and functions they confer upon the holder, and the constitutional right of the signatory Head of State or Foreign Minister to issue them.

The practice in the Security Council is for the Secretary-General to table a brief statement of the fact that he has received the credentials of a representative and that he considers them to be adequate credentials.² In its early days the Security Council used formally to approve these reports of credentials by the Secretary-General under Rule 15, but has for some time ceased to do so for reasons which are not entirely clear; though there may be a presumption that credentials, as reported by the Secretary-General, stand unless and until they are challenged. It should be noticed that Rule 16 permits this, and that Rule 17 makes it clear that if the credentials of a representative are challenged he does not lose any of his rights as representative to the Council until the matter

¹ These elementary facts must be stated because it has been suggested that the emergence of Peking Government means that China's Membership has lapsed. This is fallacious: the United Nations and its Organs are composed of States and no changes of Government within those States affect their status as Members.

² He describes them as adequate provisional credentials where they are in the form of a telegram. In certain recent cases the Secretary-General has reported the receipt of 'adequate *provisional* credentials' and nothing more has been heard of the matter.

has been settled. Further, there is nothing in these Rules of Procedure to prevent the credentials of a representative being challenged at any time.

As regards representation, the provisions of Article 28 (1) are mandatory, and there is no provision in either the Charter or the Security Council's Rules of Procedure to cover the absence of a representative, and there are no provisions for a quorum³; further, Article 28 (1) can hardly be taken to mean that *all* Members of the Council must be actually present at the Council table in order for business to be done; although each Member of the Council appoints both a representative and an alternative representative it is not inconceivable that both these individuals might be unable to attend, and that a Council meeting might be necessary before a new representative could be accredited by that Member. It would be impossible to hold that this could prevent the Council meeting. Therefore the involuntary absence of a representative and his alternate, through illness or some other unavoidable personal cause, cannot prevent the Council meeting and conducting its business.⁴

However, there are two other kinds of absence which are more serious; the first may be called constitutional and arises where the State Member of the Council changes its form or disappears or where the representative of a Member loses his right of representation because the Government which has accredited him has been displaced by another. Secondly, there may be absence arising from the deliberate withdrawal by a Member of its representative from the Council table.

The question whether a Member of the Council is constitutionally present or absent is one of the essential questions that arise on credentials, that is to say whether the individual who has signed them had the constitutional right to do so, that is to say, was Head of State or Foreign Minister in the lawful government. If the answer to this question is negative, then the representative

³ It is of interest to compare the Rules of Procedure of the League Council here. There Rule 6 (1) provided that if the President of the League Council ceased to represent his country on the Council he should be replaced by 'the new representative'; but this provision was not expressed to cover other representatives of the Council as well, nor did it indicate how the change would be made if the President had ceased to represent his country by reason of a more or less violent change of Government or where the President's position was challenged by a rival Government in his country. Rule 8 provided that a majority of the League Council would constitute a quorum both for discussion and decision. Rule 9 (1) laid down that for a League Council decision the agreement was necessary of 'all Members of the League represented at the meeting'.

⁴ That is to say, business other than the adoption of a resolution requiring the concurring affirmative vote of a permanent member where that member's representative is absent; but it is most unlikely that in these circumstances a representative could not be accredited at some time between the meeting of the Council and its adoption of the resolution.

presenting the credentials cannot sit. The constitutional absence of a permanent Member would certainly render the Council improperly constituted by reason of Articles 23, 28 (1) and 27 (3) (read together) and the same reasoning based on Articles 23 and 28 (1) might be applied to the constitutional absence of a non-permanent Member.

Deliberate withdrawal by a Member of its representative appears at first sight to be a breach of Article 28 (1) of the Charter. But there are in any case obvious reasons why it cannot be regarded as a bar to a *meeting* of the Council and its taking procedural decisions. But where a permanent Member has withdrawn its representative from the Council the question arises whether such absence can be regarded as abstention, for purposes of Article 27 (3) of the Charter, on *decisions* made by the Council during its absence. The practice of abstention, which has grown up amongst the permanent Members is contrary to the literal provisions of Article 27 (3), but is conformable with their spirit; while abstention plainly cannot be said to be 'an affirmative vote' it is concurrence, in that the abstaining permanent Member shows itself unwilling to obstruct the will of the majority by exercise of a veto; abstention therefore is a kind of concurrence. Can voluntary absence of a permanent Member be regarded as abstention on decisions of the Council, whether procedural or not procedural, even in the case before us where the ostensible reason for the withdrawal of the U.S.S.R. is that the Council is improperly constituted, and where the U.S.S.R. has declared that it will regard as illegal all decisions taken while the unconstitutional situation continues? ⁵ It seems that this question cannot be answered wholly in legal terms. It is at least plain that one permanent Member cannot impose upon the Council its view of the particular constitutional situation in which the Council may find itself; on the other hand it might be said that, where such an issue arises, the Council should take the advice of the International Court of Justice on the legal issues and that if it chooses to deal with the matter politically, the deadlock is likely to continue. It may be added here that it would be impossible to regard constitutional absence as defined above as equivalent to abstention.

There are two possible approaches to the problem. The first might be formulated as follows: The Security Council is the agent of all the Members of the United Nations for the maintenance of international peace and security. It is an international body

⁵ The U.S.S.R. presented a draft resolution to the Security Council at its 459th meeting proposing that the Council decide 'not to recognise the credentials of the representative' of China. Notwithstanding the provisions of Rule 17, and dissatisfied with the fact that the Council did not take an immediate decision on this draft resolution, the Soviet representative withdrew from the Council.

and therefore cannot as such adopt a political attitude towards a new government of a member of the United Nations, it follows that no decision of the Council can be interpreted as an act of collective recognition. Nevertheless it is bound to take notice of changes of government and make the necessary changes of representation in the Council. When therefore a new government establishes itself and has effective control of the great part of the national territory of a Member of the Council, it should be regarded as a government entitled to send a representative to the Security Council. Whether the new government is such as to be entitled to representation is a question to be determined by each Member of the Council for itself. It can be regarded as a question of fact or as a question of recognition; this distinction will be considered further below but in either case the only decision the Council *as such* can take is a decision upon the credentials of the new representative; this decision is procedural.⁶ The same reasoning may be applied to representation in other organs of the United Nations.

The other approach may be formulated as follows: A decision to admit the representative of a new government to the Security Council is so close to recognition of that government by the Members of the Council who vote for it that it cannot be regarded as a simple decision on credentials; and, whether or not the decision amounts to collective recognition, it is a major political decision by the Council. Therefore for the purpose of Article 27 of the Charter it is not a procedural decision. It can only be made there with the concurrence (including perhaps absention) of the five permanent Members.⁷

The Secretary-General has circulated a memorandum which received considerable publicity and which attempted to make a distinction between recognition of a new government and acceptance of its representatives in United Nations organs on the same lines as the first approach. However, the memorandum went rather further to suggest that the test of the right to representation was closely similar to the test for admission of a new Member to the

⁶ Approval of credentials forms part of the Rules of Procedure of the Council. Further in 1936 when the League Assembly had to decide the case of the delegation sent by Abyssinia to the annual session, held at the time when Abyssinia was under Italian occupation, the decision was treated as procedural. However it might be possible to argue that while approval of credentials is procedural, disapproval of credentials is not procedural, just as it can be argued that for the Security Council to place a matter on its agenda is procedural, but for it to refuse to place a matter on is not procedural.

⁷ There is a nice question whether, where the representation of a permanent Member is in issue, the sitting representative can defeat all efforts to remove him by persistent exercise of the veto; and it indeed may be asked whether as a matter of natural justice he should have a vote at all, though of course there is no provision of the Charter, even implied, which could be relied upon to deprive a permanent Member of his vote in this case.

United Nations under Article 4. This is open to the objection that the decision whether the applicant State does in fact satisfy the conditions is a political decision wholly within the discretion of the Member concerned; Members would thus be called on to make their decision to vote for the admission of the new government's representative dependent on their appreciation of the character of that government (readiness and willingness to carry out its obligations); many would find it difficult to distinguish this decision from a decision upon recognition or would at least fear that a vote for admission would be interpreted by other Members as constituting recognition.

The second approach is not strictly consistent with the Charter, however it is an approach which is justified on the ground that it is the only politically realistic approach. It is inconsistent with the Charter because it reads the distinction between Article 27 (2) and Article 27 (3) as if the wording in the first paragraph was 'procedural' and in the second paragraph 'substantive'; in fact the distinction the Charter makes is between 'procedural matters' and 'other matters'. These two expressions are mutually exclusive; in other words if the matter on which the Council takes a decision is procedural, the political importance of the decision is irrelevant; it can still be carried by seven affirmative votes. Had the Charter made a distinction between procedural matters on the one hand and substantive or politically important matters on the other the two concepts would not have excluded one another, in other words a matter might have been procedural but yet still subject to the provisions of Article 27 (3) as regards voting because of its political importance. However, it is doubtful whether this analysis of the Charter would appeal to or have any weight with Members of the Council. 'Other matters' in Article 27 (3) has in practice been regarded as equivalent to 'substantive matters' and arguments to the contrary would probably be regarded as special pleading. It is politically more realistic because though various doctrines of recognition may be favoured there is not in fact agreement within the United Nations that the distinction between recognition of a foreign government and acceptance of its representatives in the United Nations is maintainable. While it is probable that all Members would agree that for the representative of one Member to sit in the same United Nations body as the representative of a Member, the government of which the first Member does not recognise, does not constitute recognition of that government there are many who would consider that *to vote for* the acceptance of the representative of the government which they

did not recognise could be distinguished only with great difficulty from recognition.

The first approach might however be practicable if the test of representation is made one simply of fact, unalloyed by any predictions as to how the new government whose representation is in issue is going to fulfil the obligations of the Charter. In the case of China the Peking Government has effective control over the greater part of the territory and people of China; it is in this sense at any rate representative of China.

J. E. S. FAWCETT.⁸

DIVORCE—SPAIN AND SOUTH AMERICA AND THE COURTS

Divorce is the one subject which never will be regulated successfully by international agreement. There is complete lack of accord even within the same family of nations, with common language, racial, and religious characteristics, as are Spain and the Spanish-American Republics. How, therefore, can it ever be supposed that countries as different in every way as Finland and Spain, Germany and Argentina, or the United States and Uruguay will ever agree on this most important aspect of law?

The last attempt to regulate divorce internationally was at the Hague Conference of 1928, but it was a complete failure in that no agreement was reached. The previous effort was a Convention of June 12, 1902, which in 1939 had only eight lukewarm adherents. The prospects of agreement now are even more remote.

The Spanish system of law, with many objective variations, applies to many millions of persons in over twenty different countries. It is therefore interesting to analyse the attitude to divorce adopted by the mother country Spain, and the principal countries related to her by close ties of kinship and affinity.

Spain has been for centuries the traditional champion in Europe of the indissolubility of marriage, a position she maintains up to this moment. It has been so with the exception of seven years, between 1932 and 1938, when divorce 'quod ad vinculum' was permitted under the Spanish Divorce Law of March 2, 1932, promulgated during the Republican regime. This law was speedily abrogated by the present administration, as being contrary to public order and morals, by law of September 23, 1939, and it is unquestionable that Spanish public opinion still supports that verdict.

This law was followed closely by a further enactment of May 11, 1942, which re-establishes adultery as a criminal offence, but with a subtle distinction between a man and a woman. It is a punishable

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offence in the case of the wife always, but in the case of the husband only if he commits adultery with a member of his household, or if he 'notoriously' keeps a mistress outside. The punishment can be up to six years' imprisonment.

Divorce 'a mensa et thoro', which is no more than judicial separation, is allowed in Spain, and in all Spanish-American Republics where dissolution of the marriage is forbidden.

Spain applies the 'lex patriæ' rule to all questions of family relations, status, capacity and condition of persons, and expressly provides that Spanish law in regard to those matters shall govern all Spaniards even though they be domiciled abroad (Article 9 of the Civil Code). The practical effect of this is that no Spaniard can obtain a decree of divorce anywhere, whatever his domicile, valid by Spanish law, unless it be an ecclesiastical dissolution by a Roman Catholic Ecclesiastical Court recognised by the Codex Juris Canonici.

The position in Argentina is not dissimilar. Article 198 of the Argentine Civil Code and Article 64 of the Civil Marriage Law enacts that the only divorce permissible in Argentina is divorce 'a mensa et thoro', and Article 219 of the Code confirms that marriage shall be dissolved only 'by the death of one of the spouses'. But Argentine law does not apply the 'lex patriæ'; on the contrary, Articles 6 and 8 of the Civil Code provide clearly that Argentine law, in all its aspects, shall apply to all persons 'domiciled' in Argentina, including foreigners, and 'domicile' in the Argentine sense is 'residence'. Therefore a decree of divorce obtained say in England by an English husband domiciled in England in the English sense, but resident in Argentina for business purposes, would not be recognised in Argentina; and if he married again such marriage would there be bigamous. On the other hand, a divorce obtained in England by an Argentine national who is domiciled and resident in this country would likewise not be recognised as valid because it would be considered contrary to public order. Various attempts have been made to introduce an amendment whereby a divorce obtained in those circumstances should be recognised as valid, but so far without success.

The indissolubility of marriage is maintained also in Colombia, where again Article 153 of the Colombian Civil Code enacts that 'divorce does not dissolve the marriage, but only suspends the life together of the spouses'; and in Chile, Paraguay and Brazil. The latter, of course, follows Portuguese rather than Spanish practice.

On the other hand, Bolivia, Costa Rica, Cuba, Guatemala, Mexico, Peru, Panama, Nicaragua, Honduras, Ecuador, Uruguay and Venezuela, all allow divorce which dissolves the marriage, as opposed to bed and board separation. Of those, Cuba, Mexico, Nicaragua, Panama and Peru include mutual consent among the grounds for divorce; and in the Mexican Federal District of Morelos, of which the capital is Cuernavaca, divorce can be obtained without any formalities of residence whatsoever, on the grounds of 'temperamental incompatibility'.

The doctrine of collusion is quite unknown in any of these Republics.

Nor is there any unity in the courts as to the effect of decrees of divorce. Thus the Supreme Court of Brazil has held that it cannot recognise the divorce of two foreigners, even though the decree of divorce was properly pronounced by a competent court outside Brazil, because it is contrary to public order. (Judgment of November 4, 1916.) The Italian courts, on the other hand, do recognise a divorce obtained abroad by foreigners, providing that by their national law divorce is not forbidden. (Judgments of the Milan Court of June 24, 1921; Lucca, December 25, 1921; Parma, March 14, 1921.) The Spanish courts do not recognise, as effective in Spain, any divorce, wherever decreed, and whatever be the nationality or domicile of the parties, it being considered contrary to public order. (Royal Order of February 16, 1917; judgment of March 31, 1911.)

The French courts have held that no person may be divorced in France if the national law of the parties, *e.g.*, Spanish, Argentine, or Brazilian, forbid it. (*Clunet*, 1899, p. 127, and *Clunet*, 1891, p. 504; 1893, p. 627, and *Sirey*, 1915, 2, 45.)

The English courts, however, do recognise as valid decrees of divorce pronounced by a foreign court, providing the decree is deemed to be valid by the municipal law (including those rules of Private International Law applied by the municipal law) of the domicile of the husband. (*Armitage v. Att.-Gen.* [1906] P. 135.) Indeed the doctrine of domicile is supreme in England, not only as regards the validity of foreign decrees but also, of course, as regards the vesting of jurisdiction in the English courts. (*Le Mesurier v. Le Mesurier* [1895] A.C. 517.¹) The nationality of the parties and their national law count for nothing, even though by their

¹ This is subject to statutory exceptions: see Matrimonial Causes Act, 1937, s. 13, Matrimonial Causes (War Marriages) Act, 1944, s. 1, Law Reform (Miscellaneous Provisions) Act, 1949, s. 1.

national law divorce is forbidden, and even though by that law the decree of the English courts may be quite valueless, as in the case of Spaniards, Chilians, Brazilians, Argentines, Colombians and Paraguayans.

This is, of course, a vast subject on which a book could and should be written. But the above observations are sufficient to illustrate the difficulties which confront any attempt to unify this most important branch of law.

RAFAEL VALLS.²

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY OF HIS
MOTHER AND HIS SISTER JEANNETTE SCOTT

The Institute of International Law announces the subject for the Grotius Prize (1,200 Swiss francs) to be awarded in 1952. The subject is the following :—

‘A critical study of the legal status of the *continental shelf* and of the questions involved in the use of the sea above it and of its sea-bed and subsoil, beyond the outer limit of the territorial waters.’

The competition is open to anyone, except members or associates or former members or associates of the Institute.

The essays submitted should be unpublished manuscripts of not less than 150 nor more than 500 pages corresponding to a printed octavo page of the same character as a page of the 1948 volume of the *Annuaire de l'Institut de Droit International*. Essays may be written in English, French, German, Italian or Spanish. They should be sent anonymously and in three copies. Each copy must be supplied with two mottoes. The same mottoes should be inscribed on an accompanying envelope containing the surname and first names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Acting Deputy Secretary-General of the Institute (M. Hans Wehberg, 1 avenue de la Grenade, Geneva) not later than December 31, 1951.

The revised conditions of the prize will be found in the *Annuaire de l'Institut de Droit International* for 1950, which will be published before the end of 1950. They will be published also in the *Friedens-Warte* (Basle), 1950, No. 2.

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THE LEGALITY OF 'JIM CROW' REGULATIONS

WHENEVER a judicial decision is rendered which upholds human dignity or vindicates the rights of Negroes, there are international lawyers who at once claim the decision as evidence of the growing respect for human rights and as proof of the binding nature of the human rights clauses of the Charter of the United Nations. Usually these decisions are published in Law Reports which are not always easily accessible, and too frequently the partisan in question is so blinded by his coloured glasses that he fails to realise when the decision has been based on the Charter and when the Charter has been completely disregarded. Such an attitude does no good to the cause of human rights. For these reasons it is essential whenever such a decision has been delivered that it should be examined with care and placed in its correct perspective.

On June 5, 1950, the Supreme Court of the United States delivered three judgments declaring illegal certain regulations and legislation directed against coloured persons solely on account of their colour, while two weeks previously, on May 22, the Appellate Division of the Supreme Court of the Union of South Africa delivered a similar verdict.

When dealing with legal provisions concerning coloured persons, or the members of any other minority, the words of the Permanent Court of International Justice should be borne in mind, particularly as the matter in issue frequently turns on the meaning of the concept of equality: 'It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality. . . . The equality between members of the majority and of the minority must be an effective, genuine equality. . . . (It means) that the majority shall not be given a privileged situation as compared with the minority' for 'there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law'.²

Similar considerations must have been present in the minds of the members of the Appellate Division of the Supreme Court of the Union of South Africa when, in March, 1950, they heard the case of *Abdurahman v. R.*³ The appellant had been fined for inciting a crowd of non-European holders of first-class railway tickets to enter first-class railway coaches marked 'Europeans Only'. It was

¹ *Minority Schools in Albania*, 1935, Series A/B, No. 64, pp. 19-20.

² *German Settlers in Poland*, 1923, Series B, No. 6, p. 24.

³ Heard March 23, 24, 1950, and judgment delivered May 22, 1950: text of judgment made available by the Registrar of the Appeal Court, Bloemfontein.

alleged by the Crown that the appellant's action was contrary to section 3 (c) of the Railways and Harbours Regulation Act, 1916,⁴ and regulations made thereunder in 1937. By section 3 (c) the Administration was empowered to control, manage and superintend railways, while section 4 (6) permitted the making of regulations with respect to 'the reservation . . . of any railway coach . . . for the exclusive use of . . . persons of particular races, . . . and the restriction of any such person to the use of the . . . coach . . . so reserved'. According to the 1937 Regulations, as amended in 1946, 'In the case of the reservation of a portion of a train every passenger belonging to the category of persons in respect of whom the reservation has been made shall . . . be restricted to the use of that portion of the train which has been so reserved', although 'where one or more coaches . . . bear notices indicating in express terms that the exclusive use thereof has been reserved for persons of a particular race, the other coaches forming part of that train, whether or not they bear any such inscription . . . shall not be deemed to be reserved for the exclusive use of any particular race . . .'.

When the Court came to consider these regulations it pointed out that there must be 'substantial equality of treatment as between different races or classes', and it held that the regulations were ultra vires the statute on the ground of unreasonableness. The court applied the test of unreasonableness laid down by Lord Russell C.J. in *Kruse v. Johnson*,⁵ and said: 'It is clear from what Lord Russell said that regulations may be declared to be invalid on the ground of unreasonableness in the specialised sense of that word if they are found to be partial and unequal in their operation as between different classes, unless of course the enabling Act specifically authorises partiality and inequality'. It was pointed out by the Court that while non-Europeans could not use the reserved coaches, there was no regulation which prevented Europeans from using the unreserved portions of the train, and 'making a reservation in favour of Europeans only results in partial and unequal treatment as between different races, for . . . Europeans are given the right to use every portion of the train; the non-Europeans cannot use the reserved portion and it is only the latter who can be punished criminally. It seems . . . obvious that such treatment is partial and unequal to a substantial degree'. In view of this finding of inequality—'It is one thing to authorise discrimination and quite another thing to authorise discrimination

⁴ Act No. 22 of 1916.

⁵ [1898] 2 Q.B. 91.

coupled with partiality and inequality in treatment'—the Court held the regulations to be null and void and quashed the conviction.

The decision in *Abdurahman v. R.* may be the last for a very long time in which a South African court shows any liberal tendencies towards non-Europeans, for, while the matter was sub judice, the 1916 Railway Act was amended and brought into line with the general *apartheid* legislation enacted under the present Government in South Africa.

Of the three decisions of the United States Supreme Court, the one that most nearly resembled *Abdurahman v. R.* was *Henderson v. United States, et al.*⁶ The Southern Railway Company had issued regulations conditionally reserving for Negroes the two end tables nearest the kitchen, which could be curtained off from the rest of the dining car. These tables, too, were to be available to whites exclusively if the other tables were fully occupied before any Negro passenger presented himself. The problem before the court was the compatibility of these regulations with section 3 (1) of the Interstate Commerce Act⁷ which makes it unlawful for a railroad engaged in interstate commerce 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .'. The Court held that the regulations violated the Act.

On the occasion that gave rise to the present action, the appellant went to the dining-car immediately dinner was announced and found that white persons were seated at the tables normally reserved for Negroes. Although there was a seat vacant at one of these tables, the appellant was prevented from taking his seat, and despite the fact that he was told he would be informed when space was available, no such message was ever sent. The Interstate Commerce Commission, before which the appellant filed his complaint, found that he had been subjected to undue and unreasonable prejudice, but held that this was a casual incident due to the bad judgment of an employee and refused to make any order for the future. The District Court of Maryland, however, held that the company's regulations infringed the Act and modified rules were introduced. By these, ten tables of four seats each were reserved, exclusively for whites, and one of four seats exclusively for Negroes. The latter was separated from the others by a curtain. The Commission did not regard these regulations as invalid and the rules were sustained by the District Court as 'proportionately fair', having respect to the average number of Negro passengers. The

⁶ Supreme Court, October Term, 1949, No. 25. The texts of this and the other Supreme Court decisions were made available by the Clerk of the Supreme Court.

⁷ 1940, 54 Stat. 902.

Supreme Court held that these new rules were violative of the legislation: 'Where a dining-car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage'. The Court pointed out that if more than four Negroes or forty whites desired dinner when all their reserved seats were occupied they would be unable to sit down, even though some of the seats at the tables reserved for the other race might not be occupied. It also pointed out that matters of this nature must be considered from the point of view of each particular case: 'It is argued that the limited demand for dining-car facilities by Negro passengers justifies the regulations. But it is no answer to the particular passenger who is denied service at an unoccupied place in a dining-car that, on the average, persons like him are served'.

As we have seen, in its advisory opinion concerning the *German Settlers in Poland*, the Permanent Court of International Justice pointed out that 'there must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law'.⁸ Similar principles are apparent in the Supreme Court's judgment, for in returning the case to the Commission it declared: 'That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer to the requirements of section 3 (1). Distinctions that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader than if only one were affected'.

In 1938 the Supreme Court of the United States, in *Missouri ex rel. Gaines v. Canada*,⁹ decided that in the educational field Negroes received 'separate but equal' treatment if university facilities were available to them on a basis of complete segregation, even though this should mean attendance at a special institution founded for only one student. This state of affairs came up for re-examination in *Sweatt v. Painter*.¹⁰ The petitioner applied for admission to the University of Texas Law School, but his application was refused solely because he was a Negro.¹¹ The petitioner therefore brought a suit for mandamus to compel his admission. At the time of the institution of the suit there was no law school in Texas which admitted Negroes.

⁸ Series B, No. 6, p. 24.

⁹ 305 U.S. 337; cf. the present writer's 'Human Rights and the Colour Problem', 3 *Current Legal Problems*, 1950, p. 236.

¹⁰ Supreme Court, October Term, 1949, No. 44.

¹¹ Texas Constitution, Art. 7, ss. 7, 14; Texas Civ. Stat., ss. 2643b, 2719, 2900.

The State court agreed that the total denial to the petitioner of opportunities to gain a legal education, while granting it to others, deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. Instead of granting the relief prayed, however, the court continued the case long enough to allow the State to provide substantially equal facilities and, on learning that the authorities had adopted an order calling for the opening of a Negro law school, dismissed the action. While the appeal was pending the Negro law school opened, but the petitioner refused to register there.

The State court found that the new school offered opportunities 'substantially equivalent' to those offered to white students by the University of Texas and denied mandamus. After this decision had been confirmed by the Court of Civil Appeal and a writ of error had been refused by the Texas Supreme Court, the United States Supreme Court granted certiorari and admitted the petition.

The Supreme Court pointed out that the University of Texas Law School 'may properly be considered one of the nation's ranking law schools', and compared its facilities with those offered by the Negro school and by the law school opened since the commencement of the trial at the Texas State University for Negroes: 'Whether the University of Texas Law School is compared with the original or new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. . . . What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question closed'. The Court also pointed out that the school which was open to the appellant was not open to the vast majority of persons with whom he would come into contact in his profession, whether as clients, jurors or practitioners.

In this case, too, the Court examined the argument that there was equal discrimination against all, regardless of colour. 'It may be argued that excluding petitioner from that school (the University of Texas Law School) is no different from excluding white students from the new law school. The contention overlooks realities. . . . "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities"'.¹²

It is submitted that this decision is not sufficient ground for

¹² *Shelley v. Kraemer* (1948) 334 U.S. 1, 22.

asserting that separate law schools are now rendered unconstitutional. The Court merely said that the 'petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State'. In the light of this statement it appears that if it were possible to provide equal treatment in a separate school of similar character, segregation would be compatible with the Fourteenth Amendment.

The third case decided by the Supreme Court on June 5, 1950, also concerned university facilities for Negro students. In *McLaurin v. Oklahoma State Regents for Higher Education*¹³ the appellant had applied for admission to the University of Oklahoma as a postgraduate student in education. Admission was denied to him on the basis of a 1941 statute¹⁴ which made it a misdemeanour 'to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught'. In the light of the *Gaines Case* the District Court allowed the appellant's complaint that this legislation was unconstitutional. The legislature therefore passed an amending statute admitting Negroes to white schools, in cases where such institutions offered courses not available in the Negro schools. At such institutions the programme of instruction 'shall be given . . . upon a segregated basis'.¹⁵ The appellant was then admitted to the University of Oklahoma Graduate School, but 'he was required to sit apart at a designated desk in an ante-room adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria'. The appellant sought to remove these conditions, but the District Court held that they did not violate the Fourteenth Amendment. From this decision the present appeal was lodged.

Before the case came up for hearing in the Supreme Court, the conditions meted out to the appellant were modified. 'He is now assigned to a seat in the classroom in a row specified for coloured students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.' The Court pointed out that although these restrictions were imposed to satisfy as nearly as possible the requirements of the statute, 'they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin

¹³ Supreme Court, October Term, 1949, No. 34.

¹⁴ 70 Okla. Stat., ss. 455, 456, 457.

¹⁵ Okla. Stat. Ann. tit. 70, ss. 455, 456, 457 (1950).

apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession'.

It has often been alleged that if coloured persons were not discriminated against by law, their position would not be one iota improved. It is contended that social segregation would merely reproduce the situation enforced by legislation. This may well be true, but it provides no excuse for reinforcing private prejudices by State-sponsored sanctions.¹⁶ The Supreme Court drew attention to this point: 'It may be argued that appellant will be in no better position when the restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the State which prohibit the intellectual co-mingling of students, and the refusal of individuals to co-mingle where the State presents no such bar'.¹⁷ Having made this point, the Court held the restrictions imposed upon the appellant to be unconstitutional.

The two university cases taken together suggest that Negroes have an equal right with their white colleagues to receive an education; that if two universities, one white and one Negro, of equal status and potentiality are established, segregation might be legal; but that if the Negro institution is inferior to the other, Negroes must be permitted to attend the better school, and that if they do attend, any attempt by the authorities to subject them to restrictions which would prejudice them in any way would be contrary to the United States Constitution.

The significance of the four cases discussed in this Note lies in the fact that all deal with the problem of equal rights for persons of different races, but in no case did the Court make any reference to the Charter of the United Nations or the Universal Declaration of Human Rights. The decisions might very well be in line with the trends of those documents, but the legal reasoning in each case would have led to the same decision had the United Nations never been established.

L. C. GREEN.¹⁸

¹⁶ For a discussion of this point, cf. the writer's 'Human Rights and the Colour Problem', *loc. cit.*, n. 9, above.

¹⁷ *Shelley v. Kraemer*, n. 12, above, at pp. 13-14.

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THE PROPER LAW OF THE CONTRACT: A REJOINDER

I

Although rejoinders are no longer fashionable, the defence¹ of the subjective theory of the proper law craves leave to challenge Dr. Morris' reply for the objectivists.²

Dr. Morris does not rest his case on broad considerations of principle, but on a number of points the strength of which is perhaps not always sufficient to carry so heavy a burden as the objective theory is called upon to discharge. These arguments will have to be traversed seriatim, but at the outset two matters of a wider impact require to be emphasised.

It is submitted that Dr. Morris fails, and, indeed, does not even attempt, to show that any real and practically ascertainable advantage can be derived from the objective theory that could not be as well achieved by a sensibly developed and applied subjective theory; that the dispute is one of substance rather than of formulation only; that the choice between the two theories is capable of arousing more than academic interest and justifies the effort of discarding an established practice. Here and there, it is true, differences can be discovered, but this is so only in rare border-line or textbook cases. They should not be allowed to lead to the adoption of a theory which, even if it solves these particular cases more elegantly, cannot by any means claim the monopoly of a satisfactory solution and, it ought to be admitted, involves grave disadvantages in many directions.

Furthermore, Dr. Morris continues to ignore the vital question which objectivists apparently prefer to leave open: what really does the objective theory teach? Is it expressed by Dr. Cheshire's formula according to which a contract is subject to the law of the country with which it has the most substantial connection? Or is it 'a substantial connection' that is required? Or is the test perhaps provided by the formula that effect should be given to the parties' intention except where the contract has no or no substantial connection with the selected legal system? At present the answers to these questions are shrouded in obscurity. If they were supplied, the cleavage between the two theories would perhaps be narrowed or even disappear.

II

(1) To deny the great influence which since Story's time English judges have exercised in this branch of the law, is not warranted by

¹ (1950) 3 I.L.Q. 60.

² (1950) 3 I.L.Q. 197.

the facts.³ And Dr. Morris' suggestion that 'it is the objective theory, not the subjective, which is indigenous and peculiar to English law',⁴ is, of course, not more than an *ipse dixit*.

(2) It seems that Dr. Morris wishes to revive the hackneyed and long exploded argument that it is logically impossible to allow parties to choose the law governing their contract without first ascertaining the law permitting their choice. It is necessary, therefore, to engage once more in laying a ghost. Let it be done in the words of Professor Rheinstein of Chicago⁵:

There cannot be found any reason why a State, through its legislature or its courts, should not lay down the following rule: Whenever parties to a situation which is alleged by one to have given rise to a legally enforceable contract, have in some ascertainable way expressed the opinion that disputes which may later arise out of that relation shall be decided under the legal system of some particular State or country, such law shall be resorted to whenever such a dispute actually arises. This formulation may sound cumbersome, but, as has been shown so convincingly by Cook and Falconbridge himself, in the conflict of laws we have occasionally to use cumbersome language lest we be misunderstood. Now, if we express our proposition in this form, it should be clear that there is no reason, at least of legal theory, why it might not be adopted by a State or country. A State or country, in determining which choice of law rule it wishes to adopt for contract problems, must in its choice of law rule state some point of contact, and that point of contact must be expressed in factual terms. When we adopt as point of contact the place of contracting, we mean that place at which there have happened those factual events which, as defined in the internal contract law of the State in question, transform preliminary talks and negotiations into a legally enforceable contract. . . . Why should it be 'logically' impossible for a State to refer the decision of a contract problem to the law of that State of which the parties have ascertainably and jointly spoken or thought as determinative of controversies that may actually arise out of their relation? There simply does not exist any such 'logical' reason. . . . The law to whose prohibitive, restrictive and other provisions the alleged contract is subject is the law referred to

³ The influence of Story's *Commentaries* (1834) on Fœlix (1843) and Savigny (1849) is well known.

⁴ P. 198.

⁵ 15 *University of Chicago Law Review* (1948) 478 *sqq.*, 485, 486 (review of Dean Falconbridge's *Essays on Conflict of Laws*). Rheinstein's useful contribution became only recently available to the writer.

by the parties, just because it is the proper law, and it is the proper law simply because the choice of law rule of the forum declares it to be such.

Dr. Morris is correct in stating⁶ that a rule of the conflict of laws cannot say that an agreement is valid, but can only say by what law the validity of an agreement is to be governed. But he is not convincing when he continues that the subjective theory cannot be made to work unless we import part of the domestic law of contracts into the conflict of laws in order to determine whether an agreement to select a proper law is binding. There are at least three possible arguments against this point to which Dr. Morris reverts in section 4 of his reply (p. 200) where he deals with the case of *non est factum*, and where he concludes by asking, 'What justification can there be for importing into the private international law of the forum of a common law country the doctrine of *non est factum*, but not the doctrine of consideration?'.

The first answer is that given by Professor Rheinstein's formulation. Again the problem, if any, is a purely terminological one, not one of logic or policy.

Secondly, to import conceptions of the domestic law into the conflict of laws is in no sense an unheard-of proposition. When the term 'marriage' within the meaning of the conflict rule is defined by reference to *Hyde v. Hyde*,⁷ English substantive law is 'imported'. This is a question of classification, and there exists a respectable body of opinion according to which classification is subject to the *lex fori*.

Thirdly and very significantly, the objective theory does not avoid such difficulty as there may be. Suppose the conflict rule reads: a commercial contract shall be governed by the law with which it is most closely connected. Does this not involve the very assumption which Dr. Morris holds against the subjective theory, viz., 'that the agreement to select a proper law is itself binding as a contract'? Does this not ascribe 'to the conflict of laws a direct influence on the rights of the parties which properly belongs only to a system of domestic law'? Moreover, if instead of expressly selecting the proper law the parties select the localising elements (as to which they enjoy complete freedom), how can the objective theory 'be made to work unless we import part of the domestic law of contracts into the conflict of laws'?

This leads to the bugbear of the plea of *non est factum*. I am induced by fraud to guarantee a bank overdraft under the mistaken

⁶ P. 199.

⁷ (1866) L.R. 1 P. & D. 130.

impression that I am witnessing some insurance document, and according to the terms of the guarantee the contract is governed by Ruritanian law. The objective theory decides that in truth the contract is subject to English law and that, therefore, *non est factum* (a defence unknown to Ruritanian law) can be pleaded. Some subjectivists will probably say that Ruritanian law applies, but that on the ground of public policy the English rules as to *non est factum* must prevail so as to prevent the continuation of a fraudulent act. Others may deny the applicability of Ruritanian law altogether and decide that, quite apart from public policy or from the English courts' traditional refusal to enforce fraudulent or unconscionable 'bargains', there was never in fact any such meeting of the minds as to create even the semblance of a legal act.⁸

(3) Dr. Morris dismisses the argument that the objective theory which allows the parties freely to select the localising elements, but precludes them from selecting the governing law, fails to achieve its object. He does so by asking some rhetorical questions, such as whether anyone 'has ever heard of business men making a journey (or even appointing agents in a foreign country) solely in order the more easily to make a contract' (p. 188). The adherents of the subjective view will reply that no such case has ever been heard of; that equally, however, nobody seems ever to have heard of a case of a capricious choice of the proper law; and that, when exceptionally one has to deal with a freak or a crank or a fraud, he would be not less likely to make a journey solely for the purpose of making a contract than to make a capricious choice. And, let it be remembered, the subjective theory would probably not enforce such choice, because it would lack *bona fides*, reasonableness, reality or genuineness or whatsoever term you prefer to employ, but the objective theory would in this very case allow the traveller to enjoy the benefit of his journey.

III

(1) Dr. Morris apparently suggests that the selection of English law in *Vita Food Products v. Unus Shipping Co.*⁹ was capricious. His main point is that he 'has never been able to fathom' why it should be reasonable to attribute to a New York shipper and a Nova Scotian shipowner the desire to apply the familiar principles of English commercial law. (This, incidentally, is not the real question. *Ex hypothesi* the parties have chosen English law and the question, therefore, is whether such choice was capricious.) To the present writer such lack of appreciation of the pre-eminence

⁸ Cf. Martin Wolff, *Private International Law* (1945) p. 446.

⁹ [1939] A.C. 277.

which English commercial law and English banking and insurance practice enjoyed in 1935, seems quite remarkable. That commercial men all over the world wished, in 1935, to facilitate access to the insurance and banking world in London, and that submission to English law was one of the methods serving this purpose, are matters of common knowledge. Just as sterling used to be the international currency, so English commercial law used to be and perhaps still is the law of a great part of the trading community. To the New York shipper and the Nova Scotian shipowner readier access to the City of London may have been irrelevant, but to their successors-in-title, in particular holders of the documents, this may have been most material. Negotiability of documents, for instance, was clearly facilitated by the submission to English law, and this is why evidence on the nationality of underwriters (or re-insurers whom Dr. Morris should not forget) was probably impossible and was also unnecessary and irrelevant.¹⁰

(2) It must be maintained that the interpretation of The Hague Rules is not germane to the issue of whether or no the parties' reference to English law should be enforced. It may be that the construction put by the Privy Council upon The Hague Rules is unfortunate. This does not prove that the objective theory is attractive and the subjective theory is mischievous.

(3) To say that the present writer has ventured to reject Lord Wright's 'question-begging qualifications' of 'bona fide and legal', and prefers the qualification of reasonableness, does not do justice to the argument. If it were a question of the present writer's preference, he would probably vote for the formula that the parties' choice must be enforced except where they have chosen a law which the court could not have found to be the proper law had there been no express choice. The real point is that in truth and in fact all the possible formulations mean the same thing, merely paraphrase the same thought and constitute not more than a play with words, an exercise in terminology. Like most words, they are equally good and equally inadequate. Even the decision of border-line cases will not be helped by the adoption of the one or the other formula, for 'if a certain vagueness of outline were a well-founded objection to legal principles, and if we lawyers were to demand inflexible precision, we should probably find a more congenial sphere in mathematics'.¹¹

¹⁰ *Rheinsteint, L.c.* p. 487, approves the decision and also criticises *Owens v. Hagenbeck Wallace Shows Co.* (1937) 192 Atl. 158, referred to by Morris p. 201, note 18.

¹¹ *Martin Wolff, L.c.* pp. 199, 200. There is of course nothing new in the substance of the qualification which requires to be introduced, and it is an exaggeration to speak of 'a most important admission'; only the formulations differ, and

IV

(1) Dr. Morris would seem to admit that it promotes certainty, if parties are allowed to make an express selection of the proper law. He objects, however, to the high price which is allegedly being paid for such certainty, though he does not explain what in actual fact the price is and why it is too high. It is submitted that in the realm of commercial contracts almost no price that buys certainty can be too high, and it is believed that all practitioners and most academic lawyers would agree with this proposition. The fact that, as Dr. Morris points out, the law is not always able to achieve certainty is no reason why certainty of decision, once achieved and found to be just and workable, should not be preserved.

(2) It must be admitted that the question whether the contract in *Boissevain v. Weil*¹² was subject to the law of England or the law of Monaco is an arguable one; as so frequently, the point is in the last resort one of impression. Notwithstanding Dr. Morris' comments, however, the present writer feels compelled to adhere to the view expressed earlier, particularly in view of a fact which has not yet been sufficiently emphasised: As the plaintiff was told by the defendant, the money was paid in Monaco to enable the borrower to buy freedom from the clutches of the Gestapo for her son, a Jew, interned in France.¹³ The danger which objectivists seem to run is that they are inclined to test the question of the most substantial connection of a contract with a legal system by *ex post facto* standards. In the summer of 1944, when her son's life was at stake, the defendant's contract was, to the writer's mind, most substantially connected with the place where this life could be saved. The English currency, the English bank, the English courts, English law, these are certainly matters establishing a substantial connection with England, but they cannot displace the most substantial, the indeed vital, connection with Monaco.

(3) To Dr. Morris' mind¹⁴ it is a puzzling argument that the objective theory would introduce the *renvoi* doctrine into the private international law of contracts. Yet it must seem clear enough to those who believe that, for the time being at least, the English courts have, notwithstanding Dr. Morris' criticism, adopted the 'foreign-court-theory' of *renvoi* and are likely to allow it universal

only where they are too rigid (as, *e.g.*, in the Polish Code,—M. Wolff, p. 427), a real danger becomes apparent. Indeed, neither this nor the earlier article claim any originality. There is probably nothing that has not already been said about this somewhat sterile subject.

¹² [1949] 1 K.B. 482 (C.A.); [1950] 1 All E.R. 728 (H.L.).

¹³ [1950] 1 All E.R. 728 at p. 730, *per* Lord Morton, at p. 731 *per* Lord Radcliffe. See already [1948] 1 All E.R. 894 *per* Croom-Johnson J.

¹⁴ P. 205.

scope. If the English judge must apply the law which would be applied by the judge sitting in that foreign country to the law of which English conflict rules refer, it follows that the English judge who finds the contract to be most closely connected with France must apply English law, if the French judge would do so. This consequence can be eliminated only by basing the decision on the intention of the parties (as opposed to the most substantial connection) and by saying that, when parties intend French law to be applicable, they mean French internal law.¹⁵ It is by this method that all adherents of the subjective theory (including, probably, Lord Wright whose *lapsus calami*, committed clearly obiter, should not be over-rated) succeed in avoiding renvoi within the realm of contracts. But the same method is not open to those who accept objective tests rather than the intention of the parties as their yardstick. To them renvoi, as at present practised in England, cannot be a 'mere phantom'; it is bound to be dire reality.

(4) In the earlier article it was submitted that the parties' selection of English law should always be enforced in order to establish harmony with the English rule of procedure, according to which the court applies English law, unless foreign law is (a) pleaded and (b) proved. Dr. Morris¹⁶ who, incidentally, ignores the latter requirement, replies that, where, for instance, a 'Californian contract' is expressly made subject to English law and one of the parties pleads and, presumably, proves Californian law, his success or failure depends on the question whether the objective or the subjective theory is applied. This is correct, but *nihil ad rem*. The point is that, however closely a contract is connected with a foreign legal system, the judge must apply English law, unless foreign law is pleaded and proved. To this extent, the autonomy of the parties is complete. Indeed, to this extent, as many practitioners must have had occasion to observe, the capriciousness and cynicism of the parties is without limits, and such considerations as costs, substantial or tactical advantages, the personality of the judge, the availability of experts and other matters far removed from 'substantial connection' are of paramount importance. No legal system that aims at a minimum of coherency and consistency can afford to allow these results, yet to refuse to enforce the parties' contractual reference to English law.

(5) The reason why advocates of the subjective theory object to the splitting of the contract into separate phases, is to be found in the very fact that they are guided by 'the realities of the situation'

¹⁵ This argument, too, is of course very old: see, e.g., the material collected by Haudek, *Die Bedeutung des Parteiwillens* (1931) pp. 94, 95.

¹⁶ Pp. 205, 206.

which, in this particular case, happily coincide with simplicity and elegance. Those who have practical experience of advising upon, litigating about, or drafting international contracts, will readily agree that a theory which leads to and even welcomes the splitting up of the contract, is something terrifying and formidable. In a field which by the nature of things bristles with difficulties, simplicity and certainty are required by 'the realities of the situation', but jeopardised by a splitting up of the contract that is ill-defined, unnecessary and apt to exceed narrow limits. *Pace* Dr. Morris,¹⁷ no price is too high to avoid such consequences, and there is no room for parsimony or illiberality. It must, however, also be doubted whether the price is really high. Dr. Morris has not defined or quantified it except by pointing out that an international contract is a complicated transaction and may lead to many related but distinct questions. This must certainly be accepted, but it does not follow that the complications should be increased.

F. A. MANN.¹⁸

¹⁷ P. 206.

¹⁸ LL.D. (Lond.), Solicitor, London.

BOOK REVIEWS

The Law of Nations. An Introduction to the International Law of Peace. By J. L. BRIERLY. Fourth Edition. [Oxford University Press. 1949. ix and 306 pp. 8s. 6d.]

PROFESSOR Brierly has undertaken and has most happily achieved the extremely difficult task of revising a classic. It is not, indeed, the first time that he has added to the text of the *Law of Nations*. But this fourth edition embodies considerable changes which the difficulty of the times did not permit to be made when the third edition was published in 1942. The learned author then confined himself to the elimination of the out of date, and the revision of certain opinions. He has now added some thirty or forty pages to the text—a not inconsiderable addition since the whole work comprises only three hundred pages even now.

It is not uncharacteristic that fully half of the new matter has been inserted into the first two chapters—on the Origins and the Character of the Modern System of International Law respectively. Though the chapters on the Legal Organisation of International Society and on Disputes (now renamed Disputes and the Maintenance of International Order) have also been reshaped, the coralline structure of the United Nations and its Specialised Agencies is not suffered to distract the eye. On that structure Professor Brierly's verdict is forthright: 'We have discarded the system of the Covenant which, though not certainly, might possibly have worked, and we have substituted for it one which hardly even professes to be workable, and instead of limiting the sovereignty of states we have extended the effective sovereignty of the Great Powers, the only states whose sovereignty is still a formidable reality in the modern world'. Whilst there is no denying the formal truth of this judgment, may it not be hazarded that it discounts to some extent the significance of the fact that the United Nations was ever set up at all? Can the view really be accepted that 'When States do not even share in a common desire to work together, it might be better that for the time being they should cease to go through the motions of co-operation'?

Protestations of this sort may well seem to be mere pious ejaculations. They possibly are no more than that. But a little more cogency may perhaps be claimed for them if they are developed into an argument that the thesis presented might be held to demand abandonment of 'pretence' in the realm not only of international organisation but in that of 'general international law' also. Yet Professor Brierly claims for this last that, even as things are, it

is rendering services to the world and, in his Preface, he describes it, significantly enough, as an 'institution'—'just one institution among others which we can use for the building of a saner international order'. Is not the United Nations system, albeit highly defective, very probably designed for a situation unlikely to recur, and certainly marred in particular because 'by limiting the Security Council to questions of security it leaves that body little work of a constructive character', just such another engine? Its builders embarked upon its construction with the conviction that the larger institution had 'failed'. Their own, lesser, failure will not disabuse others of that conviction, however exaggerated it may have been. Nor should it be allowed to obscure the strength of the instinct for, or habit of, organisation.

But it would be impertinent to suggest that these considerations have escaped Professor Brierly. Their expression is perhaps after all excused on the ground of *pietas*. Or it may be pleaded that this lucid little book, which it is a pleasure to have occasion to read yet once more in its entirety, presents so urgently the fundamental problems of the existing international legal ordering that it is impossible not to cast about for ways in which to resist some of the conclusions it inevitably reaches.

CLIVE PARRY.¹

The North Atlantic Treaty, The Brussels Treaty and the Charter of the United Nations. By Sir W. ERIC BECKETT, K.C.M.G., K.C.
[The London Institute of World Affairs : Stevens & Sons, Ltd.
1950. viii and 72 pp. 10s. 6d.]

THIS little book consists in an address delivered by Sir Eric Beckett to the International Law Association in May, 1949, together with the text of the instruments with which the address dealt, or rather such parts of them as are requisite to the understanding of its somewhat intricate argument. Sir Eric is concerned solely with the reconcilability of the North Atlantic and Brussels Treaties with the Charter considered as legal documents. His thesis, which is eminently reasonable, is that the former instruments are not 'regional arrangements' within the meaning of Chapter VIII of the Charter, but that they are nevertheless compatible with the latter since they are mere arrangements for 'collective self-defence' and since Article 51 admits the 'inherent right of individual or collective self-defence'. He disclaims any intention of political assessment of the new alliances though it would appear permissible to say that he does contrive not a few parenthetic observations upon the argument that the North Atlantic Treaty runs counter to the 'spirit' of the Charter. The explanation, it may be hazarded, is

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that none of these documents possesses a primarily legal complexion. Too much subtlety would be wasted upon them. Thus Sir Eric, no doubt rightly, avoids any such analysis of the peculiar term 'collective self-defence' as the International Law Commission attempted last year. It is perhaps more regrettable that he should not have adverted to the historical influence upon the drafting of Chapter VIII of the Charter of Article 21 of the Covenant.

CLIVE PARRY.

A Treatise on the Law of Prize. By C. J. COLOMBOS. Third Edition. [London : Longmans, Green & Co., Ltd. 1949. xiii and 421 pp. £2 2s.]

THE book under review was first published in 1926, and a second edition appeared in 1940. It grew out of a LL.D. thesis which Dr. Colombos submitted to the University of London in 1925, entitled 'Prize Law during the Great War'. The original intention of the author, it appears, was to limit the work to the application of prize law by British prize courts. In its final form, however, the author has, under each section heading, after setting out British decisions on the subject, added those of the prize courts of most of the belligerent countries of the first world war. The part dealing with foreign prize courts and the law they apply has unfortunately not been handled with the same care as that dealing with the prize courts and prize law of Britain. The description of the composition of the French *Conseil des Prises*, for instance, lacks accuracy and mention is omitted of perhaps the most important member of the Conseil, the *Commissaire du Gouvernement*.

The second edition is largely a reprint of the first, while the third is largely a reprint of the second, each time with but a slight revision and an addition of a few passages and new cases. The general outlook and atmosphere of the book remain much unaltered. Much that has become of no more than historical value has been left undisturbed, while some recent and more important issues have been given only either an inadequate treatment or a fleeting mention in the footnotes.

The expressed purpose of the present edition is to incorporate recent cases. 'These decisions,' as the author himself says, 'have been largely concerned with the final working out of principles which had already been well settled in the past', and have not made any striking innovations. This being so, one may legitimately doubt whether the author is well advised in bringing out presently a new edition of his book, since prize decisions still continue to be published and, even with regard to already published decisions, the author has admittedly not been able to obtain many decisions in full and consequently has had to rely on secondary sources. Is it through want

of complete reports or misinterpretation that the reference to the recent French case of the *Ning-Po* [1946] (p. 60) shows that the case has apparently been misapprehended and, as a result, the jurisdiction of the French *Conseil des Prises* misrepresented? It would have been preferable to delay publication of a new edition until the bulk of the prize judgments of the second world war have become available.

Furthermore, in *casu*, had the author merely quoted the French decree of September 2, 1939, defining the jurisdiction of the *Conseil des Prises*, the error could have easily been avoided. Indeed, in dealing with the law as applied in Continental countries, the purely Common Law approach is far from suitable. Greater prominence should have been given to the legislation governing the matter. One cannot help observing that, in what purports to be an up-to-date general treatise on prize law, only laconic references have been made to modern Continental prize codes, such as the German *Prisenordnung* of 1939.

The author devotes the whole of the final chapter to the problem of an international prize court, and is strongly in favour of such a jurisdiction. It is, therefore, all the more remarkable that he should have throughout the whole work made almost no mention of any of the numerous international decisions on the subject. The Mixed Arbitral Tribunals set up after the first world war rendered many decisions of real interest to prize law, *e.g.*, the cases of *N.G. Kyriakides* (*The 'Georgios'*), [1928] *D.*, *P. et C. Marouli* (*The 'Kyma'*) [1928], etc. Of great interest also is the Portugo-German Arbitration [1928, 1930]. It is to be hoped that, in some future revision of his book, the author will incorporate a discussion of some at least of these international decisions, the authority of many of which do not always support his own opinions and conclusions.

Notwithstanding these observations, the book stands out as a very useful and convenient handbook for the practitioner and the student.

B. CHENG.¹

The Jewish Yearbook of International Law. Edited by N. FEINBERG and J. STOYANOVSKY. [Jerusalem, Rubin Mass. 1949. xv and 304 pp. Price : £P2.500 or \$8.]

THIS is the first volume of a periodical publication 'devoted mainly to the study of questions of international law affecting or of particular interest to the Jewish people'. It was ready for the printer in the Spring of 1948. Since then the State of Israel has become established (May, 1948) and internationally recognised. These events

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have resulted in depriving many of the articles included in this volume of their topical character so that they have now an historical interest only. This applies, in particular, to Professor Feinberg's contribution on 'The Recognition of the Jewish People in International Law,' to the paper on 'The Meaning of the Term "National Home for the Jewish People"' which comes from the pen of Dr. Frankenstein and is largely based on his little book about *Palestine in the Light of International Law* (London, 1946), and to the legal aspects of the Mandatory Power's policy on immigration and land sales about which Dr. Stoyanovsky writes under the title of 'Law and Policy under the Palestine Mandate'.

There follows a very useful article by Dr. Akzin on 'The United Nations and Palestine' in which he traces the attitude adopted by the United Nations towards the thorny problem of Palestine from 1944 up to the summer of 1948; his collection of the relevant material will be found convenient by all those who wish to embark upon detailed studies. Dr. Jacob Robinson writes on a subject to which he has already made some noteworthy contributions: 'From Protection of Minorities to Promotion of Human Rights'. Although Professor Bentwich's article on the 'International Refugee Organisation of the United Nations' was written before the Organisation officially came into being, it discloses the author's intimate knowledge of the subject and its problems.

Professor Lauterpacht's contribution on the 'Nationality of Denationalised Persons' is of particular value and it must be regretted that it has appeared in a publication to which the general reader will not have ready access. The author treats the effects in international law of the Nazi decree of November, 1941, pronouncing the wholesale expatriation of German Jews, and of its repeal by the Allied Authorities. Although the more recent French and Swiss practice has fortunately developed in a manner which renders much of Professor Lauterpacht's justified criticism redundant, an English decision (*Loewenthal v. Att.-Gen.* [1948] 1 All E.R. 295) has disappointed his prognosis that *R. v. The Home Secretary, ex. p. L.* [1945] 1 K.B. 7 would be recognised as having 'departed from established principle' and was 'unlikely to be followed' (p. 182). The result reached in that decision was obviously right, but, with great deference, it is equally clear that the reasoning cannot command approval (see (1945) 6 L.Q.R. 126). Nowhere was this pointed out more forcefully than in the course of the argument addressed to Romer J. in *Loewenthal's Case* by Sir Valentine Holmes K.C. who had appeared for the Crown in *Ex p. L., ubi supra*, but who, unhappily, was not called upon to argue the case. Even if this country should not recognise enemy legislation enacted in war-time (cf. *Re Friedrich Krupp Aktiengesellschaft* [1917] 2 Ch. 188), this rule could not apply to nationality legislation in general or the

decree of 1941 in particular. It must be hoped that, if the point comes before the courts again, it will be taken to appeal and that the court's attention will be drawn to Professor Lauterpacht's trenchant yet judicious observations. In one respect *Ex p. L.* did not have the result feared by Professor Lauterpacht (p. 178): a British-born woman who married a 'denationalised' German after 1941, did not lose her British nationality. Although in England her husband was deemed to be still German, the question whether she acquired German nationality (and thus lost British nationality) depended not on English, but on German law by which it was answered in the negative.

After articles by N. Robinson on 'Reparation and Restitution in International Law as affecting Jews' and by Anatole Goldstein on 'Jewish Aspects of Crimes against Humanity' the *Year Book* closes with a paper by Professor Kelsen who deals with 'Collective and Individual Responsibility for Acts of State in International Law'. This paper largely reiterates the main points made by the author in (1947) 1 I.L.Q. 153.

F. A. MANN.

Manual of German Law, Volume I: General Introduction. Civil and Commercial Law. With a Foreword by Sir ERIC BECKETT, K.C.M.G., K.C. [London: His Majesty's Stationery Office. 1950. xxvi and 297 pp. 25s.]

WHEN this Manual was written, it was primarily intended to provide elementary instruction in German law for the British staff of the Legal Division in the British Zone of Germany. At various times the Legal Division consisted of between 150 and 200 lawyers. It is now much reduced and its functions are considerably circumscribed. In view of current developments it must be expected that the number of British (and American) officers in Germany who will have occasion to resort to this work will be small.

What originally was the secondary purpose of the Manual has, therefore, now become its main and permanent one, *viz.*, to assist the comparative lawyer who requires a first introduction into German law. Even if it is viewed with the more critical eye appropriate to a study of this character, the Manual constitutes a remarkable achievement.

It opens with a General Introduction in the course of which Dr. Cohn gives a survey of some facts and conceptions which are necessary for understanding the basis of present German law and practice. There follows the main part of the work for which again Dr. Cohn is responsible and in which, in about 175 pages, he sets

forth the legal rules contained in the 2,385 sections of the German Civil Code and in a number of supplemental statutes. The author deserves congratulations for the precision and conciseness which he has applied to the presentation of an enormous mass of material. Even the most technical parts of German law of property (translated as 'law of things') should be readily intelligible to a foreign lawyer. This is due to the careful selection of examples, very frequently taken from actual cases decided by the courts, and the author's practical rather than dogmatic approach. Yet brevity has not been bought at the expense of comprehensiveness: there is no major rule contained in or developed from the Civil Code which the author omits to mention. Moreover, although he cannot be exhaustive and, consequently, must sometimes be a little misleading for the uninitiated, he is remarkably accurate. Sometimes, it is true, one cannot help differing from him. The statement that 'according to the rule "cessante ratione legis, cessat lex ipsa" [the Continental judge] can refuse to apply a law that an English judge would have to apply' (p. 33), is putting the point rather high. To read in the year 1950 that 'in the case of an English mortgage the mortgagee becomes the owner of the property in question, while the mortgagor retains an equitable right in the property' (p. 126), is a little surprising. In some cases the translations are unexpected (*e.g.*, 'hypothec' where one would expect 'mortgage') and in others the use of the untranslated German word would seem to lack justification: why not Land Registry for Grundbuch, freedom of contract for Vertragsfreiheit or conveyance for Auflassung? But these are minor points which cannot affect the excellent qualities of the work as a whole.

In the second part of the Manual Professor Martin Wolff, in 64 pages, expounds German commercial law (excluding shipping law) which is mainly contained in the Commercial Code of 1897. This venerable Nestor of German civilians, this unique teacher to whom generations of German lawyers owe their legal education, has once more been given the opportunity of proving his art of presentation. Many of those who used to sit at the author's feet and now come across such parts of the work as section 40 dealing with the effects of registration in the Commercial Register will be under the illusion that they are hearing rather than reading the author. To those who are not burdened by these reminiscences Dr. Wolff's introduction can be recommended as a safe and attractive guide to German Commercial Law written by a master of the subject.

The Manual concludes with a list of German terms, a model of entries in the German Land Register and a note on the Monetary Reform of 1948.

This is a very useful book and it is with interest that one will expect the second volume which in the main will be devoted to Criminal Law and Procedure.

F. A. MANN.

Law and the Modern Mind. By JEROME FRANK. [London : Stevens & Sons, Ltd. 1949. xxxi and 368 pp. 25s.]

JUDGE Frank's famous book, first published in 1931 in the United States and reprinted there for a sixth time in 1949, is now made available for the first time in an English edition. It is widely known as the leading statement of the doctrine of an important wing of the 'realist' (Judge Frank now prefers the title of 'sceptic') school of Jurisprudence. The text of the 1949 edition is identical with that of the first edition. As the author says in the course of a lengthy preface to this edition, he follows George Bernard Shaw's rule in denying to an elderly author the right to alter the work of a young author even when the young author happens to be himself.

The book is an assault upon the proposition that the law is a system of known and certain rules applied by a judge. Judge Frank is primarily concerned with the work of trial courts. There, although the existence of fixed rules is constantly asserted, there is abundant evidence to show that decisions are primarily determined by a wide variety of factors : reactions of friendliness or hostility to particular witnesses, the idiosyncrasies of trial judges, the varying capacities and incapacities of individual witnesses, to suggest a few. The result is that these highly variable factors operating behind the allegedly fixed legal rules actually determine the results in given cases. The insistence on legal certainty is, in Judge Frank's view, at least partly a form of father-complex : man transfers his yearning for certainty from the father to the law. The conclusion seems to be that by realising that all manner of diverse factors and prejudices produce the decision in a law suit, and not a set of fixed rules, will judges be able to appreciate the true elements in decision-making. This will enable them, if not to heal themselves, at least to know their prejudices and biases. But as the author points out in colourful language (at p. 244) : 'We must stop telling stork-fibs about how law is born and cease even hinting that perhaps there is still some truth in Peter Pan legends of a juristic happy hunting ground in a land of legal absolutes'.

The author's views have been unkindly handled in some quarters. Dr. Allen has written of a jazz jurisprudence for a jazz age. Judge Frank rather belabours his case, and one not infrequently has the feeling that the point might be made more briefly. But there is a very real point in what he writes. It has influenced much juristic writing. A brilliant example is Professor Levi's *Introduction to Legal Reasoning* (University of Chicago Press, 1949). Independently, Walter Wheeler Cook approached the problems of Private International Law from a similar standpoint in his *Logical and Legal Bases of The Conflict of Laws*, a book which has

done much to direct the approach to conflictual problems away from Bealite preconceptions. Though one may feel that Judge Frank sometimes overstates and often repeats, the publication of this legal classic in England is an event of importance.

Traité de Science Politique. By GEORGES BURDEAU. [Vols. 1 and 2. Paris : 1949. Librairie Générale de Droit et de Jurisprudence. 577 pp. 499 pp. 1,000 frs. each.]

PROFESSOR Georges Burdeau, of the University of Dijon has set himself a major task in attempting to survey the whole field of political science, and two more volumes are apparently due from him before the work is complete.

The work has an especial interest for English readers since it represents an attempt, rather novel for a member of a continental law faculty, at treating politics realistically, as well as from a purely formal point of view. It therefore comes much nearer in its approach to the Anglo-American tradition of political studies than most French works of this kind, while at the same time preserving in form and style the rather rigorous discipline of the continental treatise. It also contains in its plentiful footnotes references to a good deal of continental writing, particularly of a sociological kind, which is indicative of the kind of approach to political questions that has culminated in this book.

The essentials of Professor Burdeau's approach can be gathered from the way in which he divides his subject matter which is unlike that adopted either by our 'political theorists' or our 'constitutional lawyers', or our 'institutionalists'. The first volume is devoted to 'Political Power', beginning with a theoretical analysis of the relations between 'power' and 'law' and continuing with a discussion of the relations between society, and the power which emanates from it and controls it. After that he proceeds to a discussion of how power is actually organised and wielded in the modern world, concluding with an analysis from this angle of the nature and function of political parties.

It is only at this stage (and in the second volume) that Professor Burdeau tackles the classic question of political science, the nature and functions of the State. The latter part of this volume is taken up with a discussion of the forms of the State. It may be remarked in parenthesis that although Professor Burdeau is more familiar with the structure and ethos of the Commonwealth than are many of his compatriots, he does deal with the subject under the general heading of federalism, and thus may unconsciously help to perpetuate an illusion that is at the moment having rather serious repercussions in the practical world. And in discussing Soviet federalism, he is content to waive his earlier determination not to allow the letter to replace the substance, and to accept a highly

abstract and unrealistic view of Soviet constitutional history and practice. This may perhaps spring from insufficient attention in the section on political parties to the role and function of the 'single party' in the 'single party State'.

Of considerably more interest, and very illuminating for his general position, is Professor Burdeau's discussion (in Volume 1) of the nature of international law and of his controversy with Professor G. Scelle. Since for Professor Burdeau, law is created by the self-consciousness of a given society and is made real by the existence of political power to which that society simultaneously gives birth, he rejects altogether the idea that international law can be created in any way by States, or can indeed come into existence at all so long as States survive, since these must by the logic of their own nature demand from their citizens total allegiance to the ends they themselves propose and cannot sacrifice these ends to any superior objective. What is called international law today is thus for Professor Burdeau merely a set of rules that States accept for the conduct of their affairs so long as these rules suit them, and purely out of self-interest. The State as such is not therefore merely an irrelevant factor in the creation of a genuine international law, but an actual impediment. There can be no progress by organisations that accept its perpetuation, and the creation of international law must await the creation of a self-conscious international society to which (and not to the State) individuals will be prepared to give their allegiance.

MAX BELOFF.¹

Readings in American Legal History. Edited by MARK DEWOLFE HOWE. [Harvard University Press. (London: Geoffrey Cumberlege.) 1949. x and 529 pp. \$7.50.]

MR. DEWOLFE HOWE, who is already well known on both sides of the Atlantic for his admirable edition of the Pollock-Holmes letters, has compiled with great skill a very full selection of documents to illustrate 'a selected group of problems and a limited number of periods in American legal history'. Five questions have been selected for discussion. First, the general problem of the reception and rejection of English law; secondly, the condition of the English law, 1550-1650; thirdly, the law in the Massachusetts Bay Colony; fourthly, critical problems of American law, 1790-1820; fifthly, the nineteenth-century movement for codification. The limits of this notice do not permit consideration in detail of the many fascinating questions disclosed in these documents; it can only be said that the whole work will undoubtedly receive the anxious attention of all who are interested in the history of

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the common law. English readers in particular will be grateful for having available in a convenient form lengthy extracts from Bacon's essay of 1616 on law reform, the *Examen legum Angliæ* of 1656, and Hale's tract on amending the law. Presumably the price would be even higher than it is without the typewriter type-setting, but it imposes a severe strain on the eyesight.

The Double Taxation Conventions, Supplement to Volume I. By F. E. КОЧ. [London : Stevens & Sons, Ltd. 1950. xv and 185 pp. 25s.]

SINCE the publication of Volume I of the author's work (reviewed at I.L.Q., Vol. 1, p. 252) the Double Taxation Convention with Australia has been given the force of law and the Government of the United Kingdom has concluded relief conventions with the Dominion of New Zealand, the Netherlands, Sweden and the Republic of Ireland, and has also made arrangements for relief from Double Taxation with the Governments of various smaller countries within the British Commonwealth of Nations.

Part I of the present supplement consists of additions to and revisions of the commentary of Volume I made necessary by subsequent developments. It is very clearly arranged to facilitate page to page reference to Volume I. Its main pre-occupation is with the provisions of the Finance Act, 1947, and the regulations (Treasury Decisions 5569 and 5580) issued by the U.S. Treasury for the enforcement of the Convention with the U.K. It occasions no surprise that the definition of 'permanent establishment'—as the present reviewer has indicated might be the case (I.L.Q., Vol. 3, p. 295)—has turned out to be a matter of some difficulty.

The U.S. Treasury definition (at p. 23) occupies roughly one page of close print. Valuable emphasis is laid on the fact, which might perhaps be overlooked, that there is no permanent establishment without business *activity*: 'The term "permanent establishment" as used in the convention implies the active conduct therein of a business enterprise. The mere ownership, for example, of timberlands or a warehouse in the United States by a United Kingdom enterprise does not mean that such enterprise has a permanent establishment therein'.

Readers interested in the law of administrative procedure will note with interest the preamble to U.S. Treasury decision 5569: 'On February 22, 1947, notice of proposed rule making under the income tax convention and supplementary protocol between the United States and the United Kingdom of Great Britain and Northern Ireland, both of which were proclaimed by the President of the United States on July 30, 1946, was published in the Federal Register (12 F.R. 1236). After consideration of all such relevant

matter as was presented by interested persons regarding the proposal, the following regulations are adopted for the purposes of such convention and protocol'.

Part II of the Supplement provides a commentary on the new conventions which follows the excellent method of treatment adopted for Volume I. In general the conventions between the U.K. and the Netherlands and between the U.K. and Sweden follow the pattern for the U.K.—U.S.A. convention.

E. H. WALL.¹

Comments on the Conflict of Laws. A Student Symposium with a Foreword by MAX RHEINSTEIN, Max Pam Professor of Comparative Law, University of Chicago. [Louisiana Law Review, March, 1950: Louisiana State University Press. 1950.]

In the Autumn quarter of 1949, Professor Max Rheinstein of the University of Chicago Law School was visiting professor at the University of Louisiana where he delivered a course of lectures on the Conflict of Laws. As part of the course, papers were prepared by students under his guidance. These are now published in the March, 1950, issue of the Louisiana Law Review which, except for a short paper by Dr. Rabel on the German and Swiss Civil Codes, is entirely devoted to them.

The student papers range over a wide area; they deal with problems of jurisdiction, foreign judgments, tort, contract, negotiable instruments, property, substance and procedure. As student work, some immaturity is to be expected, but there is a remarkable freshness of approach, attributable not only to the liveliness and remarkable teaching powers of Professor Rheinstein, but also to the keenness and genuine interest of the individual authors in the problems under discussion. As Professor Rheinstein remarks in the course of a short introduction: 'This investigation is carried on in a method which may appear unorthodox to many a reader. There is nothing said about enforcement of vested rights, jurisdiction to create rights, extraterritorial effects of laws, or similar seemingly clear but empty concepts. Instead the student authors' discussions are moving on a plane of realistic discovery, appreciation and adjustment of conflicting interests of private parties harbouring certain expectations, or of states anxious to enforce certain governmental policies.'

The papers are, almost without exception, of interest to English readers. The American case material is canvassed at length and reference is also made to important English authority. There is a valuable discussion of tort problems in two papers; one entitled 'Long Distance Torts', the other 'Choice of Law in Multistate

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Libel Suits'. The problem is primarily to determine the *locus delicti commissi* in cases in which the acts constituting the tort occur in more than one jurisdiction. This is a problem of frequent occurrence in the United States with its multiplicity of law districts; but it is not without relevance in England where in two recent cases, *George Monro Ltd. v. American Cyanamid & Chemical Corporation* [1944] 1 K.B. 432, and *Bata v. Bata* [1948] W.N. 366, the question has been raised, and, it is submitted, not altogether satisfactorily treated. These two papers reflect the strong influence of Rheinstein's teaching (see his articles in 19 *Tulane Law Review* 4, 165). There is an interesting discussion of the *Vita Food* problem in a paper entitled 'Intention of The Parties—The Requirement of Substantial Connection'. The author concludes that a stipulation for a choice of law by the parties should be upheld despite the absence of a substantial connection between the contract and the law stipulated for 'unless facts are shown or indicated which strongly suggest the possibility of overreaching, or that the stipulation was purely frivolous'. A test of frivolity adds yet another terror to the qualifications of *bona fide*, legal and not contrary to public policy imposed by Lord Wright in the *Vita Food Case*. But it must be remembered that these are student papers, and it is a remarkable tribute to a teacher as erudite and as stimulating as Max Rheinstein that work of such interest and vitality has been produced.

Revue Critique de Droit International Privé. 1949. Vol. 38. Nos. 3 and 4. [Paris: Librairie du Recueil Sirey.]

THIS periodical contains four important articles. One of them by two English lawyers, E. J. Cohn and F. G. Holland, deals with principles and practice of the 'Release of Blocked French Assets in England'. It should be of considerable value to English commercial and legal practice.

J. Basdevant, the President of the International Court of Justice, publishes an essay on the 'Part played by the National (French) Judge in Interpreting Diplomatic Treaties'. The essay is concerned with French municipal, not with international law. The first question with which it deals is: Is the French judge bound to apply a state treaty concluded between his state and a foreign state? The answer is simple. He is bound, at any rate if the state treaty has been duly 'promulgated', in some exceptional cases even if it has not been published in any way, as, *e.g.*, in the case of the Armistice Treaty of 1940 between France and Germany.

The second question is: Is the French court—even an inferior court or a justice of the peace—competent to interpret the treaty? This question obviously arises only where the text is ambiguous

or where the parties disagree in respect of its interpretation. An incorrect interpretation may have political consequences; it may even create a liability for the state whose judge has erred. Despite this risk, French judicial courts accept the responsibility of interpreting state treaties provided that merely 'private interests' are dependent on such interpretation. The author gives as examples questions of nationality, jurisdiction, *cautio iudicatum solvi*, recognition of foreign judgments and others, although it cannot be conceded that in those cases the matters in issue are confined to 'private interests'. Administrative courts, notably the Conseil d'Etat, decline the interpretation of state treaties. The Conseil d'Etat applies to the French Foreign Office for information and is guided by its statement. Thus M. Basdevant can with good reason establish a trichotomy made up of the judicial function, the administrative function, and, side by side with these, the 'diplomatic' function exercised by the Foreign Office. The situation is not identical with, though similar to that of English law (apart from the difference that arises from the French distinction between judicial and administrative courts, unknown in this country). Any English court if in doubt, may apply for information to the appropriate Secretary of State; but this is not restricted to questions of interpreting a state treaty; it applies mainly to the immunities of foreign states, sovereigns, and diplomatic agents, to the existence of a foreign state and to the *de iure* recognition of a foreign government (Dicey-Morris, *Conflict of Laws*, p. 131, n. 3).

The last question is: How has the French judge to interpret a state treaty? If an international court, notably the International Court of Justice, has interpreted it in a certain way, national courts will as a rule accept such interpretation, although legally they are not bound to do so. The author further examines the old, much discussed problem as to how far the judge is allowed to make use of the *travaux préparatoires*. Continental, particularly French, courts, take such preparatory material into consideration. English courts do not, at least where an English statute is to be interpreted, although such material is as a rule easily available (official drafts, Hansard reports, and the like). In interpreting a state treaty, however, the courts are less rigorous despite the fact that in such cases the genesis of the treaty is not always ascertainable, and the pertinent material may not be open to inspection or may even be unreliable.

A noteworthy article by Starck examines the rules on the 'Proof of French Nationality and the Absolute Authority of Res Iudicata'. The new Nationality Law of France (October 19, 1945) provides that judicial decisions concerning a person's nationality are effective not only *inter partes* but *erga omnes*. The author describes the mechanism of the nationality proof, the value of nationality certificates, and the burden of proof. He indicates the reasons for

the effects of judgments *erga omnes*. He rightly rejects the abstruse doctrine that such extended effect follows from the character of nationality as an institution of public law. He discusses several thorny points in connection with the interpretation of the statute, among them the *affaire Raymond, J.* A man of this name who was called up for the army denied that he was of French nationality; the Prefect of the Département asserted the contrary. Raymond brought an action against the Prefect in order to have the doubts settled. The issue depended on the question whether Raymond's grandfather was French or not. The Court of Aix decided that the grandfather was not French and that therefore Raymond himself was a foreigner. Did the court thereby establish the nationality of the grandfather with effect *erga omnes*, so that all his children were foreigners? The Appeal Court came to this conclusion. Fortunately the Court of Cassation corrected the mistake.

André Bonnichon, Dean of the Law Faculty of Shanghai, deals with the 'Notion of Conflict of Sovereignties'. He distinguishes three 'aspects' under which one can consider conflict of laws and, corresponding to them, three 'principles' for the solution of such conflicts. The first aspect is that of a conflict of sovereignties; from this the author derives a principle for the solution of private international law. He calls it the 'formal' principle. The second aspect is given by consideration of the 'nature of legal relationships'. This leads to the 'principle' by which the facts are connected with the natural 'seat' of legal relationships. The author calls this (second) principle the '*principe essentiel*'. The third aspect is found by studying the interests of the persons concerned; it corresponds to the principle of 'social justice', the 'functional principle'. The three names given by the author to his principles are ill-chosen. The second and the third principle, however, undoubtedly exist. The advisability of determining the seat of a relationship by a study of its nature was pointed out by Savigny. The advice to study the interests of persons concerned by contemplating social justice is too vague to be of great use though nobody will disapprove of it. It has nothing to do with the methods of the Tübingen school.

The author's first principle, the conflict of sovereignties, lacks potency. The attempt to set up a general principle by which the conflict of laws can be 'reduced' (*ramené*) to a conflict of sovereignties has often been made and even in our day finds adherents; but it is nothing more than the idea that private international law is or should be founded on public international law. This is inconsistent with the fact that the rules of private international law serve the personal and property interests of private individuals, that they are concerned with contracts, torts, movables and immovables, with succession, with marriage and divorce, with parents and children, etc., and hardly ever with the interests of states.

The author traces the doctrine of conflict of sovereignties in history; his investigation breaks off in the middle of the 18th century; the continuation will appear in the next number.

As usual, the *Revue Critique* publishes a series of decisions, among them one which may become a *cause célèbre*. In the year 1946 an illegitimate child born in 1903 brought an action against her alleged mother for recognition of her maternity; the child is French; the defendant was French in 1903 and is now a Dutch national. The suit was brought in Belgium. The Brussels court held that recognition of maternity is governed by the child's personal law, therefore by French law, and that even if the mother's personal law were applicable her nationality at the child's birth, and not at any later date, would be decisive. The main problem was whether the French rules on prescription as *lex causae*, or the Belgian rules as *lex fori* are applicable. Under Belgian law a maternity action can only be brought within five years from the attainment of majority; under French law no prescription for such action runs. The court rightly denied the procedural character of prescription and applied French law as the *lex causae*. It held that the imprescriptibility of the action under French law was not opposed to Belgian *ordre public*, a view contrary to both English and German law (see *Decisions of the German Reichsgericht*, Official Collection, Vol. 106, p. 83). The remarkable conclusions of the Advocate-General on which the decision is based have been published and deserve careful study (pp. 525-550).

MARTIN WOLFF.¹

Zeitschrift für Ausländisches und Internationales Privatrecht.
1949, Vol. 15, Nos. 1 and 2. [Tübingen: Institut für
Ausländisches und Internationales Privatrecht.]

THIS periodical, founded by E. Rabel in 1926 and admirably conducted as long as Rabel remained its chief editor, slightly deteriorated when it came under Nazi rule. Notably the excellent collection of all German decisions concerned with private international law, which for many years a young lawyer published with meticulous care, as annex to the *Zeitschrift*, was discontinued in the Third Reich: his successor found little or no time for such work side by side with his duties as National-Socialist. After the destruction of the Third Reich the Institute for Private International and Foreign Law was reconstructed, and Professor Dölle was appointed as its Director and Editor of the *Zeitschrift*.

This *Zeitschrift* follows the lines designated by its founder. Every volume brings articles, surveys of the laws of foreign

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countries, documents and other legal data, foreign judicial decisions, and book reviews. The *Zeitschrift* reappeared—after a 7-year interval—in 1949 with some words of commendation from Rabel. The collection of German judicial decisions on private international law has, however, not yet been re-established, and there is no indication as to whether or not its reintroduction is planned for the future.

The new numbers of the *Zeitschrift* contain some valuable articles. Max Pagenstecher deals with a special point of German private international law. Very useful information on Greek and Italian conflict rules under the new civil codes has been given by a Greek scholar and several members of the Institute. An expert on Spanish law deals with the problem: what would have been the right decision of the Chancery Division in *Re Duke of Wellington* ([1947] Ch. 506) if the court had been informed correctly on the content of Spanish law? K. Zweigert, in a cautious methodological study, discusses the question: Is a national judge who finds some gaps in his own law, permitted to fill these by means of comparison of laws? The author carefully examines every argument which can possibly be used in favour of such gap-filling, and he wisely abstains from over-estimating the *practical* use of foreign laws.

The report of a Swiss lawyer covers mainly Swiss municipal law. Among the cases reported the case of *Ferdinand Hodler's widow* deserves attention. A portrait 'Ferdinand Hodler on his death bed' had been made by a painter Sch. without the knowledge of Hodler's widow; after Sch.'s death an art-dealer arranged a public exhibition of Sch.'s pictures, among them the 'Hodler on his death bed' and announced it in a commercial way. He was the owner of that portrait, but Hodler's widow forbade a commercial exploitation of Hodler's name and the public exhibition and asked for an injunction and 300 francs damages. The Cantonal Courts and the Federal Court decided in her favour and based the decision on the violation of her personal interests. Without Art. 28 of the Swiss civil code it would have been difficult to reach this sound solution.

MARTIN WOLFF.

Essays in the Anglo-American Principles and Practice of Private International Law (Ocherki Angloamerikanskoi Doktriny i Praktiki Myezhdunarдного Chastnogo Prava) Professor V. M. KORYETSKY. 395 pp. [Moscow, May 24, 1947. Juridical Publication of the Ministry of Justice of the U.S.S.R. 1948.]

THIS monograph provides an interesting analysis of some of the classical doctrines of our conflict of laws by a Soviet jurist. Our own statutes, law reports, textbooks and review articles are used,

and very little extraneous or ideological matter, so that Professor Koryetsky proves himself well versed in our own sources and techniques of interpretation. He deals with the theory of acquired rights, public policy or 'ordre public', renvoi, classification, corporate personality, all with special reference to what he considers to have been the distorted interpretation of our own principles to the prejudice of Soviet interests. Most of his strictures on English decisions are concerned with those now superseded. The main burden of his complaint was met by the decisions in *Lazard Bros. & Co. v. Midland Bank Ltd.* [1933] A.C. 289, and *Russian and English Bank v. Baring Bros. & Co.* [1936] A.C. 405. Even here, however, he criticises the way in which the assets of branches of former private Russian companies have not been transferred to the U.S.S.R. Government.

Here and there the writer presents positive arguments on conflict problems. He says that only the law of the place of incorporation can govern fundamentals, such as the existence or dissolution of the corporation, shareholders' rights, the legality of meetings. The 'lex fori' can only deal with such matters as jurisdiction and liability to taxes (p. 271). The effect of a transfer of shares is for the law of incorporation. The validity of the transfer between the parties may be governed by the 'lex loci actus', though even here he doubts how far the transfer of physical certificates or transfers should be treated as a transfer of things locally situated at the place of transfer (p. 281). The construction of Soviet decrees as intended to have a merely local operation is naturally attacked (p.166). But the 'comity' to which the writer appeals was a comity based on a community of concepts and economic systems, and he does not appreciate the problem of applying this principle to such a different system as that which prevails in the U.S.S.R., which lacks the common basis which makes comity possible. He notes that Western courts have refrained from manipulating several concepts to the disadvantage of the U.S.S.R. The appeal to public policy was dropped in England once the U.S.S.R. was recognised diplomatically (p. 59). Classification of Soviet decrees as penal, and therefore local, was avoided, since they were not nationalising as punishment for specific offences (p. 166). The use of the renvoi to avoid the consequences of these decrees has not been recognised judicially (p. 135).

The English lawyer will be less interested in the Western attitude to the Soviet decrees than the Russian (see Gsovski, *Soviet Civil Law*, Vol. 1, p. 302, n. 77) but the handling of the subject by a Soviet lawyer is of great interest, as evincing a similar technique to our own.

A. K. R. KIRALFY.¹

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LIST OF DOCUMENTS

I. AGREEMENTS AND OTHER DOCUMENTS

- Convention of the World Meteorological Organisation. [Treaty Series 1950/36, October 11, 1947, Cmd. 7989.]¹
- Cultural Convention between H.M. Government in the United Kingdom and the Netherlands Government. [Treaty Series 1950/34, July 7, 1948, Cmd. 7984.]²
- Agreement between the Government of the United Kingdom and the Government of Denmark relating to Trade and Commerce. [Treaty Series 1950/35, August 13, 1949, Cmd. 7986].³
- Exchange of Notes constituting an Agreement between H.M. Government in the United Kingdom and the Government of the United States of America to amend the Economic Co-operation Agreement of July 6, 1948. [Treaty Series 1950/32, January 3, 1950, Cmd. 7961.]
- Agreement between H.M. Government in the United Kingdom and the Government of the French Republic relating to Compensation for Disablement or Death due to War Injury suffered by Civilians. [France 1950/1, January 23, 1950, Cmd. 8000.]
- Exchange of Notes between H.M. Government in the United Kingdom and the Government of San Marina adding Kenya to list of territories covered by the Visa Abolition Agreement. [Treaty Series 1950/33, February 7–March 8, 1950, Cmd. 7964.]
- Agreement between the Government of the United Kingdom and the Swiss Federal Government relating to Air Services between and beyond their respective territories. [Switzerland 1950/1, April 5, 1950, Cmd. 7953.]
- Convention on Social and Medical Assistance between the Brussels Treaty Powers and the Supplementary Agreement to give effect to the Convention. [Miscellaneous 1950/6, November 7, 1949; April 17, 1950, Cmd. 7973.]
- Convention between the Governments of the United Kingdom, Belgium, France, Luxembourg and the Netherlands concerning Frontier Workers. [Miscellaneous 1950/7, April 17, 1950, Cmd. 7971.]
- Convention between the Governments of the United Kingdom, Belgium, France, Luxembourg and the Netherlands concerning Student Employees. [Miscellaneous 1950/8, April 17, 1950, Cmd. 7972.]

¹ This Convention was ratified by the Government of the U.K. on December 14, 1948.

² Ratifications exchanged at The Hague, February 11, 1950.

³ Ratifications exchanged at London on June 9, 1950.

- Supplementary Protocol No. 2 amending Agreement of September 7, 1949, for Intra-European Payments and Compensations for 1949-50. [Miscellaneous 1950/11, April 22, 1950, Cmd. 8010.]
- Agreement between the Government of the United Kingdom and the Government of Iceland relating to certain Air Transport Services. [Iceland 1950/1, May 26, 1950, Cmd. 7996.]
- Convention between the Government of the United Kingdom on their own behalf and on behalf of the Government of Southern Rhodesia relative to the Port of Beira and Connected Railways. [Portugal 1950/1, June 17, 1950, Cmd. 7983.]
- Exchange of Notes between the Government of the United Kingdom and the Spanish Government prolonging the Trade and Payments Agreement of June 23, 1948. [Treaty Series 1950/39, June 20-23, 1950, Cmd. 8008.]
- Exchange of Notes between the Government of the United Kingdom and the Government of the U.S.A. regarding Financial Issues arising out of the Bizonal Fusion Agreement. [Treaty Series 1950/38, United States 1950/1, June 28, 1950, Cmd. 7001, Cmd. 7990.]
- Agreement between the Governments of the United Kingdom, Australia, India, Pakistan and Ceylon and the Government of the Union of Burma regarding a Loan to Burma. [Treaty Series 1950/41, June 28, 1950, Cmd. 8007.]
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